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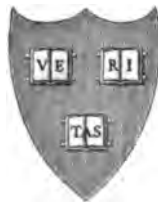
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## RECENT AND IMPORTANT OPINIONS

DELIVERED BY THE SUPREME COURT OF TENNESSEE,

**TOGETHER WITH OTHER AND GENERAL LEGAL INFORMATION.**

**J E R R E B A X T E R, Editor.**

VOLUME I.

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VOL. I.      NASHVILLE, TENN., MAY, 1877.      No. 1.

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D. WEAVER, *Trustee, for use of Planters Bank of Tennessee*, AND J. W. UNDERWOOD & CO. *v.* R. B.

HAWLEY, *et al.*; AND

F. M. CASH *v.* R. B. HAWLEY, *et al.*; AND

D. R. COOK, *et al.* *v.* R. B. HAWLEY, *et al.*; AND

D. H. TOWNSEND *v.* R. B. HAWLEY, *et al.*; AND

J. B. KIRTLAND, *et al.* *v.* R. B. HAWLEY, *et al.*

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Jackson, December 9, 1876.

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1. TO SUSTAIN A VOLUNTARY CONVEYANCE.—WHAT NECESSARY.—In order to sustain a voluntary conveyance to a wife or child, the proof must

show, not merely a sufficiency of property retained to pay the creditors assailing the conveyance, but that ample property was reserved to pay all existing creditors at the time of the conveyance. The inquiry is limited to the circumstances of the donor at the time of the execution of the conveyance, such debts as he then owed are to be estimated.

2. LIABILITY AS ENDORSER NOT TO BE TAKEN INTO ACCOUNT.—Liabilities as an endorser, when there is no evidence that the persons for whom he was liable are unable to pay them, cannot be taken into account.

CASES CITED.—Bump on F. C., 395.

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DEADERICK, CH. J., DELIVERED THE OPINION OF THE COURT.

These five cases were consolidated and heard together in the Chancery Court at Memphis. And from the decree, pronounced in favor of complainants, the defendants have appealed to this court.

The bill first named was filed 27th August, 1867, and the last named on 19th October, 1869, the others at intermediate dates.

The complainants allege that they are creditors of defendant, R. B. Hawley, and seek to set aside conveyances made on 19th April, 1862, by Hawley to Amis, and by Amis to Hawley's wife, of certain real estate in Memphis, and have the same subjected to the payment of their several debts, upon the ground that said conveyances were voluntary and fraudulent.

It is conceded, that the conveyance from Hawley to Amis and from him to Mrs. Hawley, were without any valuable consideration, and were intended to effect a settlement of the property conveyed by the husband upon his wife and children.

The only question is, was Hawley's pecuniary condition such, at the date of the settlement, that he could withdraw from his estate the property conveyed, without prejudice to the right of existing creditors.

The property conveyed to Mrs. Hawley, is estimated to be worth from \$12,000 to \$14,000, consisting in a house and lot on Third street, and a half interest in a house and lot corner of Main and Poplar streets.

Hawley was a merchant in Memphis, doing business under the name of R. B. Hawley & Co., for many years previous to April 19, 1862, the date of the settlement, up to some time in the year 1867, when he failed in business.

On the 9th January, 1862, Brooks, his book-keeper, made a balance-sheet showing the assets and liabilities of Hawley, show-

ing this result: Assets, \$72,225.49; liabilities, \$20,644.48. In the list of assets is included, cash, \$7,486.84; merchandise, \$8,993.93; negroes, \$3,175.00; real estate, \$13,700.00; bills receivable, \$28,299.24; accounts due him, \$10,070.17. The liabilities are stated to be, bills payable, \$18,672.06; accounts due, \$1,897.42. Showing an excess of assets over liabilities, \$51,581.00.

The real estate, stated as assets at \$13,700.00, is that conveyed to the wife, and should, of course, be deducted from the balance stated, leaving \$37,881.00 of excess of assets over liabilities, according to the statement of 9th January, 1862, and the book-keeper states that he was familiar with the business of Hawley and that the statement was correct, and if there was any change in the affairs of the concern from that time until he left, 12th June, 1862, it was in Hawley's favor.

In addition to the assets stated in the balance-sheet, it appears that Hawley owned in the city of Memphis on 19th April, 1862, two and 93-100 acres, estimated to be worth at that time about \$20,000, and sold by him in lots from 1865 to 1867, for about \$19,000, also another lot in said city of Memphis, worth from \$3,000 to 4,000, according to the balance-sheet, and the estimated value of these two lots, the defendant Hawley's assets exceeded his liabilities at the time the settlement was made \$60.881.

We infer from the evidence, that all or nearly all of the debts due from Hawley on 19th April, 1862, were included in the \$20,500 of liabilities charged against him in the balance-sheet, including those sued upon in these cases in which he was primarily liable.

Of the debts sought to be recovered by the bill of the Bank and Weaver, Trustee, and Underwood, Hawley on 19th April, 1862, owed the Bank a note dated 5th February, 1862, for \$1,800. And on this note Hawley paid 5th March, 1866, \$1200, and April 9th, 1866, \$600, and the complainants seek to recover the balance. And there was due to Underwood & Co., on the 19th April, 1862, a note dated November, 1861, for \$260.

Besides these two notes, the Bank seeks to recover a note dated 27th April, 1862, for \$1800, and on an endorsement for Bowman, 6th January, 1862, for \$1100, on an endorsement for Winn, 8th December, 1861, \$800, and endorsement for Crisp & Morgan, 8th March, 1862 for \$757.80, and on endorsement for same firm, 19th April, 1862, for \$634.

The bill of F. M. Cash, administrator of Mary Bolton, claims two notes, one for \$1200, dated 30th December, 1858, and the other for \$1475, dated 2nd January, 1860, on both of which Hawley was security of Grant.

The bill of D. R. Cook, *et al.*, and Eliza B. Carroll claims for Cook a debt by note due 11th March, 1861, for \$3275, on which was paid 29th April, 1867, \$3,216.10, leaving a balance of \$1,240.29, November, 1867, and E. B. Carroll exhibits two notes on Hawley, one for \$1300, dated 4th January, 1862, due at twelve months, the other for \$1200, dated 1st January, 1862, upon which we infer, but do not adjudicate, that about \$2100 have been paid.

The bill of D. H. Townsend, executor, etc., seeks to recover from Hawley two notes of \$500 each, dated 28th May, 1859, upon which Hawley was endorser for G. H. Henkle & Co.

The bill of Kirtland and others seeks to have satisfaction of a judgment obtained March 4th, 1869, for \$1,114.80, upon an acceptance by Hawley, 25th March, 1867.

In order to sustain a voluntary conveyance to a wife or child, the proof must show not merely a sufficiency of property retained to pay the creditors assailing the conveyance, but that ample property was reserved to pay all existing creditors at the time of the conveyance, the inquiry is limited to the circumstances of the donor at the time of the execution of the conveyance; such debts as he then owed are to be estimated, but liabilities as an endorser when there is no evidence that the persons for whom he was liable are unable to pay them, cannot be taken into the account. Bump. on F. C., 395.

Of the sums sought to be recovered in this case, Hawley was principal debtor on 19th April, 1862, as follows: To the Bank in the sum of \$1800; to Cook & Co., \$3275; to E. B. Carroll \$2500, making an aggregate of \$8035, and this is probably the balance of his own indebtedness remaining unpaid, and upon these claims he paid in 1866 and 1867, upwards of \$7,000.

And while we appreciate the force of the argument of Complainants' counsel, that a large show of assets in paper is often deceptive, yet when we consider the comparative amount of debts and good and available assets, we are satisfied that no fraud was intended, and that ample means and property were retained by Hawley to pay all indebtedness when the settlement was made.

Doubtless he, in common with others, lost many of his debts, yet the proof shows that he continued actively in business until 1867, and that his credit and standing were unaffected by the con-



veyance to his wife, which was spread upon the records in two or three days after it was executed.

And it is a very reasonable supposition that at least enough was realized from debts due him, amounting to about \$39,000 to pay \$12,000 of his debts, leaving unsatisfied the \$8035 sued for in these cases.

But besides this, Hawley had, 19th April, 1862, \$9000 worth of goods; \$23,000 worth of land, and negroes valued at \$3,000 or \$4,000, and retained \$19,000 worth of the land undisposed of until 1865 to 1867, more than enough to pay complainants' claim, which existed April 19th, 1862, twice over.

We are of opinion, therefore, that at the time of the settlement made by Hawley upon his wife no fraud was intended, and that he did reserve ample means for the payment of all his debts, and that the Chancellor's decree must be reversed and the bills dismissed.

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G. W. PERKINS, *Trustee*, v. HARDIN SCALES, *et al.*

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Nashville, March 3, 1877.

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**VENDOR'S LIEN.—DOES NOT EXIST.—WHEN.**—The endorsee of a note, given for land, growing out of a verbal contract of sale, made by a married woman of an interest descended to her, no deed or conveyance being executed pursuant to our statute regulations, effective to convey such interest, has no lien upon said land; when such purchaser has not been influenced by representations of the married woman to accept said note.

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FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

In order to show the real questions presented in this case, we state the substance of the allegations of the bill, and the defences set up in the answer of Wilkinson and wife, the latter being the real defendant, the issue being between her and complainant.

The original bill is simply a bill to enforce a vendor's lien, based on the allegations, that Hardin Scales bought the interest

of Mrs. Wilkinson in the land by her received from her father's estate in Davidson County, gave the note sued on, as one instalment of the purchase-money, of date January, 1858; that Wilkerson and wife endorsed the note to one Mayfield, and he endorsed it, waiving demand and notice to complainant as trustee, that Hardin is now insolvent, his property attached, and had sold the land to his brother Robert Scales, who, however, held the land subject to the lien of complainant. This is all of this bill. An amended bill was then filed, which only adds to the above the charges that Mrs. Wilkinson made a deed to Hardin Scales, acknowledged it in due form, retaining a lien on the face of it for payment of the purchase-money, which was never registered, however; and that Robert Scales purchased the land from Hardin, with full knowledge of the lien, and the money had not been paid, therefore the land was liable to be sold to pay the note sued on.

The answer of Mrs. Wilkinson sets up as a defence her coverture, denies she ever executed any deed to Scales as charged, or acknowledged one as required by law; admits she had (unwillingly) agreed to sell Hardin Scales her interest, but says the sale had been rescinded, the other three notes taken up by him but this one left, because it was deemed to cover about the amount Hardin owed her as executor of her father's estate.

It is further stated, that the land has been partitioned in Davidson County, she put in possession, and Robert Scales had abandoned all claim. This is the whole case as made in the pleadings. The proof shows, that the note was endorsed by the husband, G. W. Wilkinson, he signing his own name and that of his wife on the back of the note, thus transferring it to one Mayfield.

This transfer was made as part payment for a tract of land bought by the husband, who took the title in his wife's name. She, however, was not present at the trade nor endorsement of the note. The husband stated at the time the note was given for land, and with this knowledge Perkins bought it.

The only question in the case, on the issue presented in the pleadings by the parties is, if a married woman make a contract of sale of an interest in land descended to her, but does not convey it nor make a deed pursuant to our statute regulations, effective to convey her interest, whether an endorsee of a note given for the land under the circumstances of this case has a lien on the land, and may sell the same to satisfy his debt?

We take it, no lien exists to enforce in such a case; no lien contract of sale binding on her ever existed, out of which the lien could spring. She has not conveyed and cannot be made to convey the land, is not bound by her verbal agreement, so that no sale has, in fact, been made in law.

It is possible if she had joined in the endorsement of the note herself, and at the time represented to Mayfield or Perkins that the note was given for land and was a lien on it, and they had thereby been induced by her active interference to purchase the note, she would be estopped by the fraud from asserting the contrary, as a married woman has no license to commit a fraud by our law. But the proof shows that she had nothing to do with the transfer of the note, nor did she do anything to induce Mayfield or Perkins to take the note. They no doubt trusted, as alleged in the answer, to the then well known wealth of Hardin Scales, who has since been broken by the results of the war. No such fraud is, however, alleged; no such issue is made in the pleadings.

It is true, that the land purchased in part by the note from Mayfield, was sold by her and her husband and the money collected by enforcing the vendor's lien in the State of Mississippi. But no such state of facts is charged in the bill as ground of relief, and even if they had been charged it would be more than doubtful whether this would aid complainant. No lien existed on her land in Davidson County by the contract or agreement with Hardin Scales, and it would be difficult to fix one on a married woman's land simply because her husband had endorsed the note in payment for land taking title to her, which land was afterwards sold and the money realized from it. We need not definitely decide this question however, or further discuss it. As no such facts are alleged in the bill as the ground for relief, but solely the amount of a lien taking the amended bill as part of the original the lien created by a sale of land by Mrs. Wilkerson and a deed made by her conveying the land, but not registered; this deed containing an express reservation of a lien on its face. This being the basis of the relief sought, the ground chosen by complainant on which to rest his case, he must be held to it, and cannot by proof alone make out another and different case, and have a decree in that; as we have frequently said, allegations without proof nor proof without allegation of facts, cannot be the basis of relief in a court of equity. The Chancellor made his decree evidently on the assumption of facts not alleged, on assumption of

fraud not charged. It must be reversed, and the bill dismissed with costs of this and the court below.

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DICKSON, CLARK & CO., v. H. CULP, AND OTHERS.

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Jackson, December 9, 1876.

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ATTACHING CREDITOR OF FRAUDULENT VENDEE.—NOT DEFEATED BY RIGHTS OF VENDOR.—WHEN.—Where a sale of goods is procured by fraud of the vendee title passes, though it may be subject to the rights of the vendor to avoid the sale. But if a creditor of the vendee attach the goods, before the vendor has taken any steps to avoid the sale, he cannot be deprived of the proceeds arising out of a sale under the attachment, by the vendor.

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M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

The argument for the complainants is earnest and plausible, but we are of opinion that the decree of the Chancellor is right.

After the sale by the complainants to Watson, Culp caused the goods to be attached in an attachment proceeding, instituted by himself against Watson, and under orders which we must presume to have been proper, nothing else appearing. They were sold, to whom does not appear, but it does appear that they were not purchased by Culp. All this, without any fraud or collusion on the part of Culp, or any knowledge upon his part of the fraud of Watson in the original purchase. After this, the complainants filed this bill, in which they charge that Watson procured them to sell him the goods by fraud, and it is insisted that they are entitled to the proceeds of the sale of the goods, which were still under the control of the court at the filing of the bill. The facts as to the precise attitude of Culp's attachment proceeding are very imperfectly stated; in fact, nothing else appearing than as above stated. Admitting that the complainants have the right to avoid their sale to Watson, and recover the goods from him or any one to whom he may have transferred them for a pre-existing debt, or that they might recover the proceeds of the goods from Watson or any one to whom the proceeds had been trans-

ferred, without paying any new consideration therefor," that is, for a pre-existing debt; still, we think the complainants cannot recover. Culp's proceeding was rightfully instituted. The title to the goods when attached was in Watson. The sale was valid and passed the title, and the purchaser now holds them as is not denied—at least, no effort is made to recover the goods of the purchaser or purchasers. They are not made parties. This being so, it seems to me, that it necessarily follows that the proceeds of the sale cannot now be taken from Culp, assuming that he is entitled to such proceeds as against Watson. His rights were fixed by the institution of his suit and the levy of his attachment, and must be adjudged upon the state of the land then existing.

The complainants contract with Watson was only avoided upon the filing of this bill. This did not relate back so as to release or avoid the effects of the levy under Culp's attachment or the sale thereunder. In other words, to hold for the complainants would be to hold that Culp's proceeding was rightfully instituted, his attachment properly levied upon goods of his debtor, Watson, the sale regularly made passing the title, but that he shall not receive the fruits of his litigation; that the proceeds shall be given to the complainants, whose title to the property is conceded to be lost by virtue of Culp's proceeding, and yet Culp be turned out of court to pay the costs and expenses of his litigation. It seems to us, that, if we hold that the proceeds of the sale of these goods may now be given to the complainants, in disregard of the rights of Culp, that it would also follow that the complainants would be entitled to recover the money from Culp, even though it had been paid to him under the decrees of the court; his rights do not depend upon the date of the decree or judgment in his favor, but his rights are fixed by the institution of his suit and levy of his attachment. Of course, it would be different if the property attached were taken by a superior title. Had Culp purchased these goods from Watson for a pre-existing debt, the complainants might have recovered the goods. This would have left Culp in no worse attitude than before; but now to take the proceeds from him would leave him to pay his costs and counsel fees.

Culp's right here depends not upon a purchase from Watson, but upon the effect of judicial proceeding rightfully instituted.

It has been held, that where property has been transferred with intent to hinder and delay creditors, the creditors of the fraudulent vendee not participating in the fraud may by first

causing the property to be taken in execution against the fraudulent vendee, acquire superior rights to the creditors of the fraudulent vendor. The principle here is analagous to some extent, the difference being, that here the complainants sold the goods to the debtor; but the complainants here, as well as the creditors of the fraudulent vendor in the case referred to, each seek to predicate their right upon avoiding a contract, which, as to themselves, they had the right to avoid; but before they had done so, the creditor of the debtor and fraudulent purchaser had seized the goods by execution or attachment.

Again, Watson held the title to the goods at the time they were attached, subject, it may be, to be defeated at the election of complainants; but until this election was made his title was clear; this was certainly a title which might be attached and sold, the purchaser would certainly get the title Watson had, if he even conceded that the purchaser took this title subject to be defeated at the election of complainants, it was still good for the time and might never be defeated. The purchaser in this view would purchase at his own risk, and in this view the attaching creditor would clearly be entitled to the proceeds, and the complainants rights, if any, would be to recover the goods and not the proceeds of their sale.

Decree affirmed with costs.

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## BOLE WATKINS, IN ERROR, v. THE STATE.

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Nashville, January 20, 1877.

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1. JUROR.—FORMED OPINION OF.—DISQUALIFIES.—WHEN.—Although the opinion of a juror be formed upon rumor and not upon hearing facts detailed, yet, if the juror's opinion is so fixed that it must require proof to remove it, he is not impartial, and is incompetent. It is the fact that such opinion or prejudice exists in the juror's mind, that disqualifies him, and not the question, whether such opinion is founded upon rational grounds.

2. MAYHEM.—INDICTMENT FOR.—BAD.—WHEN.—An indictment for mayhem, for cutting off the prosecutor's ear, is bad when it simply charges that the defendant made the assault unlawfully, maliciously and

feloniously, but *fails* to charge that the prosecutor's ear *was cut off unlawfully, maliciously, etc.*

CASES CITED:—Alped & Abernathy v. The State, 2 Swan. 581; Moses v. The State, 11 Hump.; Payne v. The State, 3 Hump.; Lowder v. The State, MSS.; Miller v. The State, MSS.; Act of 1829; Code, 4606.

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M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

This was a conviction for mayhem. The decree shows that in empaneling the jury, three of the jurors in answer to the usual questions, said: That they had formed opinions as to the guilt of the prisoner. That these opinions were fixed, though formed on rumor alone, without hearing the facts from the witnesses. Two of the jurors said it would require proof to remove their opinions. The court held them competent jurors. The defendant excepted and exhausted his peremptory challenge.

There are several cases, holding that opinions formed upon rumor alone do not disqualify a juror. That such opinions are not to be regarded as fixed and rational opinions, but "a mere impression which will prevent no obstruction to the force of evidence and power of truth." Alped & Abernathy v. The State, 2 Swann, 581; Moses v. The State, 11 Hum.; Payne v. The State, 3 Hum.

Where it appears to the court, that the proposed juror has a mere impression of this sort from rumor, and that he can divest himself of this impression and give defendant a fair trial, according to the evidence, the juror may properly be held competent.

But we have recently held, that although the opinion be formed upon rumor and not upon hearing the facts detailed, yet if the juror says that nevertheless his opinion is so fixed that it would require proof to remove it he is not impartial. It is the fact that such opinion or prejudice exists in the juror's mind that disqualifies him, and not the question whether such opinion is founded upon rational grounds. An irrational and unfounded prejudice may be as prejudicial to a fair trial, as an opinion founded upon better evidence; and where a juror tells that his opinion is fixed and would require evidence to remove it, we cannot assume, in the face of his statement, that he has not such opinion merely because it does not appear to us that there was a rational ground for such an opinion. Lowder v. The State, MSS.; Miller v. The State, MSS.

Again, the indictment charges that the defendant did "unlawfully, maliciously and feloniously make an assault in and upon one Isaac Lomax, colored, with a knife and other weapons, the precise kind unknown to the jury; and then and there cut off the ear of him, the said Isaac Lomax, whereby he was maimed, etc." Special exception was taken by a motion to quash, upon the ground that, although the assault is charged to have been made unlawfully, maliciously and feloniously, yet it is not charged that he cut off the prosecutor's ear unlawfully, maliciously and feloniously. If we apply the same strict rules of construction formally applied in such cases, this indictment would be bad, both as a common law indictment and under the act of 1829—Code 4606. And as the judgment must be reversed upon the first ground, this objection may be met in a new indictment, as we would, perhaps, be constrained to hold the present indictment bad.

It is argued by the Attorney-General, that there should be no reversal, as the defendants' guilt fully appears from the proof, and that his offence was of an aggravated character, and that this court only decrees for errors affecting the merits.

We cannot deny to the defendant a fair trial by an impartial jury, no matter how clear his guilt may appear to us. This trial, according to our understanding of the law, he has not had, and the judgment must be reversed and the cause remanded. (But, it may not be improper to say, that upon the facts disclosed by the bill of exceptions, we regret the necessity of reversing a judgment so amply sustained by the evidence, and where the crime so greatly deserves punishment.)

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JERE HAGERTY v. F. M. HUGHES.

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Nashville, May 1, 1873.

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*Reported in 4 B. & L.  
222*

1. PLEADING.—ABANDONMENT OF ORIGINAL SUIT BY AMENDMENT, WHERE DECLARATION IS NOT CHANGED TO CONFORM TO WRIT.—Where a suit is brought by the husband in his name as such, and afterwards amended so as to stand as the suit of himself as administrator, for the use of his children, it is an abandonment of the original suit as husband; and un-



less the declaration be amended so as to conform to the changed condition of the suit, the action as amended cannot be maintained.

2. ATTACHMENT.—ABANDONMENT OF, WITH SUIT.—Where an ancillary attachment has issued in aid of the suit as husband, and the amendment as stated is made, the attachment is also abandoned, with the suit.

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NICHOLSON, CH. J., DELIVERED THE OPINION OF THE COURT.

In this case we held, that by the amendment made by plaintiff in his summons and declaration, he abandoned the original suit and elected to prosecute a new suit, in another vein and for a different cause of action, and that this operated as a discontinuance of the original suit.

It is now argued in the petition for re-hearing, that upon holding that the amendment had the effect of creating a new suit, instead of dismissing the cause because of its discontinuance, it should be amended that the original suit may be tried on its merits.

This would be the proper judgment, if the error had been in allowing an amendment by adding a new party, and thus merely constituting a misjoinder of parties. But the motion to amend was not by adding another party, but its legal effect was to be allowed to substitute a new and different party as plaintiff, which new party could only maintain the suit upon a different cause of action.

The original summons was that Hughes "answer Jeremiah Hagerty in an action for mal-practice, to his damage \$25,000."

The original declaration, filed at May Term, 1871, was: "Jeremiah Hagerty v. Dr. F. M. Hughes; the plaintiff sues the defendant," etc., charging mal-practice to his damage \$25,000.

There was issue on this declaration at May Term, 1871, and in July, 1871, an ancillary attachment was sworn out by Jeremiah Hagerty, to have property attached, to satisfy the damages claimed for himself.

At September Term, 1871, Hughes pleaded an abatement to the attachment, and plaintiff demurred to the plea. The plea in abatement was ordered to stand over for trial to a subsequent day of the Term, to-wit, Oct. 21st, 1871.

On the 21st of October, 1871, the plaintiff moved the court to allow him to amend the writ and declaration in this cause, so as to read "Jeremiah Hagerty, administrator, etc., of Mary Hagerty, deceased, the wife of said Jeremiah Hagerty, and for the use and benefit of her two minor children, to-wit, John

Henry and Mary Hagerty;" which, upon argument of counsel *pro* and *con*, is ordered to be done by the court and which was done, to all of which the defendant excepted."

The writ was accordingly amended so as to read, "to answer Jeremiah Hagerty, administrator of Mary Hagerty, deceased, and for the use and benefit of John Henry and Mary Hagerty, minor children, in an action for mal-practice to his damage \$25,000."

The declaration as amended, commenced: "Jeremiah Hagerty, administrator, etc. of Mary Hagerty, deceased, and for the use and benefit of her two minor children, John Henry and Mary Hagerty, v. Dr. F. M. Hughes; the plaintiff, for the use of himself, John Henry and Mary Hagerty, minors of said Mary Hagerty, deceased, sues the defendant for \$25,000 as damages," setting out the cause of action as in the original declaration, which was mal-practice to his wife, and stating no other damages than to himself, as in the original declaration.

It appears from this reference to the records, that the amendment asked for by plaintiff was, that his writ and declaration should show that Jeremiah Hagerty, administrator of Mary Hagerty, deceased, for the use of the two minor children, should prosecute the suit for \$25,000 damages to him for mal-practice.

The writ was amended as ordered, then making it a suit by Jeremiah Hagerty, administrator of Mary Hagerty, for the use of the two children. The caption of the declaration was also amended as directed, but the amendment in the commencement of the declaration does not conform to the order of court in this, that it begins: "The plaintiff for the use of himself, John Henry and Mary Hagerty, minors, etc., sues," etc.—meaning thereby, that Jeremiah Hagerty, administrator of Mary Hagerty, deceased, for the use of himself and the two children, sues. The application made by him and granted by the court was to amend his writ and declaration, so they would read: "Jeremiah Hagerty, administrator of Mary Hagerty, deceased, the wife of said Jeremiah Hagerty, and for the use and benefit of her two minor children." He did not ask to amend so that he could sue as administrator for his own use, but for the use of the children alone, and no leave was given so to amend. The insertion of the words "for use of himself," was therefore unauthorized by the court, and must be treated as surplusage. It is clear that he had no right under the statute, to sue as administrator of his wife for his own use; he could only sue for the use of the

children, and this was all that he asked to do by the amendment.

The necessary result is, that by obtaining permission to amend, so as to sue as administrator and not as husband, he abandoned his suit as husband and voluntarily elected to prosecute the suit as administrator for the use of his children, instead of for his own use. As held, in the opinion of the court, this was an abandonment of the original suit, the legal effect of which was its discontinuance.

But it is argued that the defendant objected to the amendment when applied for by plaintiff and when allowed that defendant excepted, and it is said, he ought not now to have the benefit of an error which was made against his objection. The defendant was in the position to take advantage of an error of plaintiff, but he could only do this by objecting to the application. If he had consented or had acquiesced without objection he might have been precluded from availing himself of the error in this court.

We are satisfied, after considering carefully all the suggestions urged in the petition for re-hearing, that there is no error in the former holding in the case, and that the abandonment of the original suit by plaintiff operated as a discontinuance thereof. Of course the ancillary attachment, which was ancillary to the original suit, was also discontinued.

Nor are we able to find any statute which would authorize us to dispose of the costs otherwise than against the plaintiff. By section 3201 of the Code, in cases of discontinuance, the defendant is the successful party and entitled to full costs.

The petition for re-hearing is disallowed and dismissed.

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GEORGE W. PERKINS, *Trustee*, v. HARDIN SCALES, *et al.*

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Nashville, March 2, 1877.

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CONSTITUTIONALITY OF ACT OF MARCH 6, 1875.—This act provides, "that in all cases now pending in the Supreme Court, or hereafter brought thereto, in which the judges shall be equally divided, the judgment shall be determined as follows: 'If the case depend upon the constitutionality

of any act of the General Assembly, then such judgment or decree shall be in favor of the validity of such act. In all other cases, the judgment or decree of the court below shall be affirmed. Held, to be unconstitutional.”

CASE CITED.—*Mabry v. Baxter*, MSS. at Knoxville.

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FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

A question as to the constitutionality of the act of March 6, 1875, is presented in this case, which we dispose of as preliminary to any review of the opinion formerly announced, or rather decree rendered in this case.

This act provides substantially, “that in all cases now pending in the Supreme Court, or hereafter brought thereto, in which the judges shall be equally divided, the judgment shall be determined as follows: “If the case depend upon the constitutionality of any act of the General Assembly, then such judgment or decree shall be in favor of the validity of such act. In all other cases, the judgment or decree of the court below shall be affirmed.”

This, with other cases, perhaps, was pending at the passage of the act, and probably the cases had been heard and the court, then consisting of six judges, were equally divided in opinion on them.

The question is, had the Legislature the power under the Constitution to enact, what judgment should be rendered in such cases? This we take to be the real question in this case.

By the Constitution, the powers of Government are distributed among the departments—the legislative, the executive and judicial—and “no person or persons belonging to any of these departments, shall exercise any of the power properly belonging to either of these others, except in cases herein permitted or directed. Art. 2, Sec. 1 and 2. By the schedule to the Constitution of 1870, it was provided that six judges should compose this court, until there should be a vacancy occurring after the first of January, 1873. Section 2.

The court thus constituted was the supreme judicial tribunal of this department of the government. Its function was to decide all cases on the law and facts, that might be brought before it in accordance with the jurisdiction conferred by the Constitution. In accordance with the genius of such an organization, a majority of the court would be required to render a decision, for if this was not the case, then a minority might do it, a conclusion to which no one, we take it, would assent. In any court, however, whatever decree the court shall give must be the result of its

own judgment, in the performance of the functions assigned it by the Constitution. No other department of government has the right to indicate, or dictate what that judgment shall be. This would be to usurp the judicial function, confided exclusively by the Constitution to the judicial department.

Whether the Legislature might or might not have enacted a rule for the government of the court on this subject in the future, may be possibly a different question, but that it could prescribe what the court should do in cases then before the court, we think it beyond all question to overstep the line limiting their power under the Constitution. However, we may say, it would seem difficult to distinguish in principle between the two cases, that is, of an enactment operating on cases then pending, and on future cases. In either case, it is not to prescribe a rule of future conduct to the citizen, which is the essential element of a law operating on the rights of a citizen, but would be to dictate a judgment for the court not based on the law and the facts in the case, but upon a certain state of opinion as held by the judges of the court, in which a certain result is required to be entered as the judgment of the court. This judgment, it is evident, would be the judgment or the result declared by the Legislature, and not by the court. In addition, if the Legislature could say an affirmance should be the result of an equal division of the members of the court in opinion, why not with the same propriety say that a minority should govern; or that the then oldest judges agreeing, or the then youngest; or, to reduce it to an absurdity, the three judges who should weigh the most; or any other arbitrary rule that body might choose to adopt. We cannot see where the limit shall be fixed in such a case, except at the discretion of the Legislature, if we once admit they can fix any rule at all on this subject. It may as well have been required that the opinion of the Chief Justice should have the right to decide the case, or his opinion should be the basis of the decree, as that a certain decree should be rendered because the court could not agree upon one for itself. This last is certainly the leading feature of the law before us, that is, where the court cannot agree upon an opinion or judgment, one is presented by the Legislature arbitrarily, regardless of the merits of the case before the court. This certainly is a usurpation of the judicial function, and far from the true principle of legislative or law-making action.

We need not refer to the various cases found in our own reports or those cited by counsel from other States, in support of our views on this question. We but cite from the opinion of this court in the case of *Mabry v. Baxter*, (Manuscript at Knoxville,)

in which an enactment of the Legislature was held unconstitutional, as operating on suits then pending, and prescribing what judgment the court should render, upon a simple motion to be made by defendant for the purpose. In that case it had been provided, that in a certain class of cases where several persons were sued in the same action then pending, where there were several defendants, upon motion of any defendant, or either of them, at any time before trial or final judgment, should have the right on motion, to sever and have the suit as to himself separately tried, and the cause after this was to stand against each defendant, in all respects, as if originally instituted separately against him or them. The Chief Justice said, in reference to this feature of the act, that "to entitle the defendant to a severance, a new right conferred, they are to make a motion in court; this motion must be acted on by the judge and a record made, that upon motion of the defendant he is entitled to a severance and a separate trial. The judge makes the order nominally, but as he has no discretion and he acts under the order of the Legislature, it is therefore to all intents and purposes the act of the Legislature." He adds, both in the case of severance and the transfer to the court of the residence of the defendant—provided for in the act—it is not the judgment of the court or judge. He is allowed no discretion, whether the severance or removal is to be allowed. He is commanded to give the judgment, and the exact judgment to be given is prescribed by the Legislature." These are held to be judicial and not legislative acts, and so the enactment was held unconstitutional.

If this was correct, as to a preliminary judgment to be entered by the court, much more is the law now under consideration obnoxious to the same objections, for it prescribes what shall be the judgment of the court on the merits of the case; and makes the rights of the parties to the case depend, not on the judgment of the court trying it, but on the mandate of the Legislature, which has no power to try or determine it, either the one way or the other. In other words, if the court cannot agree upon a judgment, the Legislature interposes and prescribes one to meet the emergency, and thus settles by an enactment the rights of the litigants, instead of the court.

On a constitutional question the enactment is equally objectionable, by arbitrarily prescribing a judgment affirming the constitutionality of the acts, if the court cannot agree upon the questions. Both cases, however, stand on the same principles, and are equally obnoxious to the objections we have given.

The result would be that at one term, under the direction of

the Legislature, the court would enter up a judgment giving a party a decree in his favor in a certain state of facts, or holding a certain law to be constitutional and valid. At the next term on precisely the same state of facts, upon further consideration the court in its opinion would hold a different judgment should be the result of these facts. And in the other case, that the same law was unconstitutional and void. It may be said, the court in any case or either case might change its opinion and overrule its former holding. This is very true, but in the one case, it would be a reversal or overruling the opinion or mandate of the Legislature; in the other the opinion of the court, as formerly announced. It could not be said in the first case, that the court had changed its opinion or overruled the law as held in the former opinion, because the court had given no such opinion, had made no such ruling as the law; while in the other, this would accurately express what was done. This view brings out clearly the true idea that underlies this enactment, that is, that the judgment required to be rendered is that of the Legislature and not of the court nominally rendering it. We hold, therefore, the act to be void for these reasons. We add, that the law is probably subject to other objections, but we think this suffices to show clearly its unconstitutionality, without need of further discussion. The former judgment or decree must be set aside and held not to be the judgment of the court.

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Y. P. McLEMORE v. W. W. MOORE.

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Jackson, November 3, 1876.

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**ASSAULT AND BATTERY.—JUSTIFICATION IS DEFENCE TO SUIT FOR DAMAGES.—WHEN.**—If the plaintiff committed the first assault, defendant may show what was done by him was justifiable defence to his person, and he will not be bound to show that he could not have retreated or declined the conflict without danger to his person: the defendant might still be liable, however, if his battery of the plaintiff, was excessive.

CASES CITED.—2 Gr. Ev., Sec. 95.

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DEADERICK, CH. J., DELIVERED THE OPINION OF THE COURT.

Moore sued McLemore in the Circuit Court of Carrol county,

to recover damages for an assault and battery, and had verdict and judgment in his favor, from which defendant appealed in error.

There was some evidence tending to show that plaintiff below made the first assault with a walking-stick, and that the court charged the jury: "If the plaintiff assaulted defendant with an ordinary walking-stick, and if defendant could, with reasonable safety to himself, have avoided the danger to himself by declining the assault, or by retreating, and did not do so, then if he struck the plaintiff he could not avail himself of the doctrine of self-defense."

If, in point of fact, the plaintiff had committed the first assault, the defendant might show, in justification, that what was done by him was in the necessary defense of his person. And he would not be bound to show that he could not have retreated or declined the conflict without danger to his person.

Although plaintiff may have struck the first blow or attempted to strike and was stricken in self-defense, the defendant might still be liable, if his battery of the plaintiff was excessive beyond what was apparently necessary for his self-defense. 2 Gr. Ev., Sec. 95.

For the error indicated we are constrained again to reverse the judgment in this case.

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CALDWELL & HAYES v. W. C. BOWMAN, *et al.*

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Jackson, October 7, 1876.

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1. HOMESTEAD.—CONSTRUCTION OF SECTION 11, ARTICLE 11 OF THE CONSTITUTION OF 1870, AND HOMESTEAD ACT OF 1870.—While the act of 1870 exempts the homestead from being sold by legal process, during the life of the head of a family, and gives the benefit of the exemption to the widow, and continues the exemption until the youngest child arrives at age, there is no statute that prevents the husband conveying the property as he may choose, *if he has no wife*; nor need the children join in the conveyance. Under such circumstances no right of homestead exists in favor of the children.

2. PRACTICE.—The word "about" includes an approximate amount; that is, a note a few dollars, more or less, is within its meaning, but cannot be held to include one for more than double the sum.



## FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

The first question in this case is, whether a note for \$187 assumed to be due E. Donaldson was properly allowed by the Chancellor. It is claimed to be secured under a deed of trust made by Bowman, in which a note among other liabilities secured is described as follows: "Shall also pay the amount of one note for about \$76.00, if he shall produce said note." The note for \$187 with some interest is produced and filed as the note thus secured.

We do not think, nothing more appearing to identify the note, that it answers the description of the note secured. It is not about \$76, which word "about" would include an approximate amount; that is, a note a few dollars more or less, but cannot be held to include one for more than double this sum. We think the Chancellor erred in allowing this note.

The question is presented in argument and made in Bowman's answer as to the right to a homestead in the land ordered to be sold by the decree of the court. Bowman conveyed the land by deed of trust to Donaldson to secure certain debts; at the time he seems to have been a widower, but the head of a family, having several children residing with him. He makes this the basis of his claim in his answer. He died since the case was in this court, and the suit has been revived against his heirs-at-law.

We see no ground on which the children can claim homestead under these facts. If the wife had been alive, the land could only have been conveyed under the Constitution of 1870, so as to pass the homestead by the "joint consent of husband and wife." Sec. 11, Art. 11. While the act of 1870 exempts the homestead from being sold by legal process during the life of the head of the family, and gives the benefit of the exemption to the widow, and continues the exemption until the youngest child arrives at age, there is no statute that prevents the husband conveying the property as he may choose, if he have no wife, nor that he requires that the children shall join in said conveyance. We therefore hold, that no right of homestead exists on the facts in this case in favor of the children.

The case will be reversed on the point indicated and remanded to Chancery Court for further proceedings in execution of the rust. The costs of this Court will be paid by Donaldson.

MARTIN MOORE v. ABNER HERVEY AND A. H. DUNCAN.

Jackson, November 18, 1876.

*1 See 545, 3 See 204* HOMESTEAD—INTEREST OR RIGHT OF—NOT ALIENABLE BY HUSBAND—THOUGH REVERSIONARY INTEREST IS.—ART. 11, SEC. 11, OF CONSTITUTION CONSTRUED.—It is the homestead right, or right of use and occupation, that the Constitution and statute intend to protect from sale or alienation, without the consent of the wife; but the reversionary interest of the husband in land used as a homestead, may be mortgaged and sold to pay the debts secured, otherwise the creditors claims, in many cases, would become stale, and barred by the statute of limitation.

AUTHORITIES CITED.—§ 2116a and 2117b of Code; Art. 11 and § 11 of Constitution, and homestead act of 1870; 11 Allen 287; 14 Cal. 472; 37 New H. 434; § 2106 of Code.

DEADERICK, C. J., DELIVERED THE OPINION OF THE COURT.

Complainant filed his bill and amended bill in the Chancery Court at Bolivar to subject to sale a tract of land mortgaged to him by defendant Hervey, to secure a note of \$2,000. Hervey answered and filed his cross-bill, charging fraud in procuring the note and mortgage, and usury, and also claiming a homestead in the land conveyed. It appears he has a wife who was living on the land with him when the mortgage deed was executed, and that they still occupy the conveyed premises.

The Chancellor decreed in favor of complainant for the amount of his debt and interest, and that there was no usury in the transaction, and directed that commissioners, under the provisions of §§ 2116a and 2117b of the Code, set apart the homestead, if susceptible of division, or if not, certify the fact to his court and directed a sale, if homestead was set apart, of the residue of said land, together with "the reversionary interest in the homestead" and 40 acres in a separate tract, and from this decree defendant Hervey appealed.

We find no evidence of fraud or of usury in the case, and think the Chancellor was correct in rendering a decree for the amount of the note and interest thereon.

It is insisted by defendant Hervey that the Chancellor's decree directing the sale of what is termed his "reversionary interest" in the homestead is erroneous, because the statute prohibits the sale of the land set aside as a homestead.

The Constitution, Art. 11, § 11, exempts from sale, under legal process, a homestead in the possession of a head of a family, and

the improvements thereon, to the value in all of \$1,000, and for the life of his widow, and during the minority of their children.

The language of the statute is more comprehensive than that of the Constitution, and would seem to interdict the sale of any interest in the land exempt as a homestead; yet is the homestead right, or right of use and occupation that the Constitution and statute intend to protect from sale or alienation, without the consent of the wife.

It has been said that the right of homestead is a new species of estate created by statute, which seems to have all the incidents of a freehold estate—13 Allen 287. But the fee simple remains in the husband, and a sale by him alone of the land occupied as a homestead vests the estate in the vendee, subject only to the use and occupation of the premises as a homestead.—14 Cal. 472; 37 New H. 434.

It is the homestead interest or right to the use and occupation of the premises as a homestead that cannot be sold and conveyed by the husband alone, or be subjected to sale by legal process. But the reversionary interest of the husband in the land used as a homestead may be mortgaged and sold to pay the debt secured; to hold otherwise would give no additional protection to the rights intended to be secured, but would have the effect to defeat the rights of creditors, as under our statute; the homestead is exempt during the life of husband and wife, and during the minority of any of their children, and if, during all this period, the land or reversionary interest herein is exempt from sale under the process of law, the creditors claim would, in many cases, become stale, and barred by the statute of limitations.

Although, in this case, the defendant Hervey had no right to convey the estate so as to defeat the right of homestead, yet, under § 2006 of the Code, his conveyance passed whatever interest he had therein.

We are therefore of opinion there is no error in the Chancellor's decree, and affirm it.

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JOHN P. SHARP, *Trustee, etc.*, v. JAS. A. W. HESS.

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Jackson, October 7, 1876.

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CHANCERY SALE—A PURCHASER AT—FAILING TO COMPLY WITH TERMS OF SALE—LIABLE FOR DEFICIENCY OF RE-SALE—WHEN.—In order to bind

a non-complying purchaser, at a chancery sale, for deficiencies, consequent upon the inferior bids of a second sale, the decree for the second sale must be at the *risk* of such prior purchaser, and he is entitled to *notice* that the re-sale is at *his risk*, and such notice must be set forth in the decree.

AUTHORITY CITED.—Daniel's Ch. Pr. 1461 and 1462.

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SNEED, J., DELIVERED THE OPINION OF THE COURT.

In the case of *Sharp v. Sharp, et al.*, in the Chancery Court at Humbolt, which was a bill filed against a trustee, and others, to foreclose a trust, a decree was had for the sale of the land conveyed, and at the sale thereof the tract of land was sold to defendant Hess, he being the highest and best bidder. He failed to give his notes, and otherwise comply with the terms of the sale, and the Clerk and Master so reported the fact. The court thereupon ordered a re-sale of the land, after confirming the report and setting aside and annulling the sale to Hess in terms, as follows: "It is further ordered and decreed by the court that the sale of lot No. 5, herein before described, and bid off by Jas. A. W. Hess be set aside, and for nothing held, and the Clerk and Master, after advertising, will proceed to sell said lot No. 5, etc."

The land had been bid off by Hess at \$10 per acre, and at the re-sale it was bought by John P. Sharp at \$5.00 per acre, and the sale to him confirmed. After the last sale the trustee filed a petition against Hess seeking to hold him liable for the difference between his bid and the amount for which the land sold at the second sale. The Chancellor decreed in accordance with the prayer of the petition, and the defendant Hess has appealed.

The decree was erroneous. In order to have authorized such a decree the second sale should have been decreed at the risk of Hess. The sale to him had never been confirmed, but it was expressly annulled and set aside. He was entitled to notice that the re-sale was at his risk.—Daniels Ch. Pr. 1461 and 1462, and such notice should have been set forth in the decree. The petition comes too late after the bid of Hess had been repudiated by the decree and treated as a nullity.

Let the decree be reversed and the petition dismissed.

## ALBERT JOHNSON v. CHAS. WARDEN.

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Jackson, October 28, 1876.

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1. ORDERS—DIFFERENCE BETWEEN—AND BILLS AND NOTES, DEMAND AND NOTICE NOT NECESSARY—WHEN.—Orders are not put upon the same footing of bills of exchange, and differ from bills and notes, in that they are not negotiable, and are only *prima facie* evidence of a debt of itself, not sufficient to sustain a recovery without proving a consideration. It is not an extinguishment of the precedent demand, and if an action be brought on the original liability, evidence of demand, protest and notice is not necessary.

2 NOTICE OF VIVA VOCE TESTIMONY IN CHANCERY NOT NECESSARY—WHEN.—Under § 4467 *et seq.* of the Code, in trials by jury before the Chancellor, notice of *viva voce* testimony is not necessary.

AUTHORITIES CITED.—Code, § 1961; Porter v. Dillahunt, 8 Hump. 575; Harwell v. McCulloch, 2 Tenn. 275; Kinnel v. Maney, Peck 273; Nichol v. Thompson, 1 Yerg. 151; Code, § 4467.

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SNEED, J., DELIVERED THE OPINION OF THE COURT.

The bill in this case was filed to recover \$280, the amount of defendant's alleged indebtedness to the complainant, and prays for an attachment of the property of defendant. It charges that upon a settlement of all matters of account between the parties the foregoing amount was found to be the balance due to complainant, and that the defendant then and there gave to the complainant an order for the amount upon one Norton, with the distinct understanding and agreement that if Norton would not pay the amount, he, the defendant, would. The allegations of the bill are established by the proof. The answer denied the agreement, and claims that the defendant was entitled to notice of demand and non-payment of the order before the complainant could recover. This would have been so if the action had been upon the order, but the action is predicated alone upon the original consideration. The statute provides that in an action upon such orders no suit shall be prosecuted against the drawer thereof before the order shall have been first protested for non-acceptance, and notice thereof given to the drawer before action brought, and if any such action be brought on any such order before such notice and refusal of payment by the drawer, the plaintiff shall be non-suited, and pay costs.—Code, § 1961. Under this act it was held that orders were not put upon the footing of bills of exchange. An order is not negotiable, and is only *prima facie* evidence of a debt of itself, not sufficient to

sustain a recovery without proving a consideration. It is not an extinguishment of the precedent demand, and does not prevent a party from bringing his action on the original contract.

If action is brought on the original liability, evidence of demand, protest and notice is not necessary.—*Porter v. Dillahunt*, 8 Hump. 575; *Harwell v. McCulloch*, 2 Tenn. 275; *Kinnel v. Maney*, Peck 273; *Nichol v. Thompson*, 1 Yerg. 151. In this case the suit is not upon the order, but upon the original contract, and the complainant has fully made out his case upon the proof.

When the case was called in the Chancery Court the complainant demanded a jury to try the issues of fact. A jury was thereupon empanelled, under the order of the Chancellor, and the trial proceeded. A witness was produced by complainant to be examined *viva voce*. The defendant objected to his examination on the ground that under rule 16 of the old chancery rules he was entitled to one day's notice of the introduction of *viva voce* testimony in such cases. The Chancellor overruled the objection and admitted the testimony. The rule referred to is not among the rules of Chancery Practice, adopted on the 14th of December, 1871, but whether now in force or not it is not necessary to enquire, as it had reference to the introduction of *viva voce* testimony before the Chancellor, and not before a jury in chancery. Our statutes expressly provide that the trial by jury before the Chancellor shall be conducted as jury trials at law, and upon like evidence as a suit at law.—Code, § 4467, *et seq.* No notice in such cases was necessary. All the issues were found for the complainant upon ample proof, and the Chancellor decreed accordingly.

Let the decree be affirmed.

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JOHN McCALL, S. R. CARVER AND CARROLL BEAVER  
*v.* JAS. P. CAWTHORN AND WIFE, *et al.*

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Jackson, November 18, 1870.

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RENTS—OF LAND UNDER TRUST DEED—NOT ATTACHABLE—WHEN.—A trustee holding the legal title to land, under a deed of trust, to secure

creditors, but not in possession, has no right to the rents, nor can the same be attached by the secured creditors.

AUTHORITY CITED.—9 Hum. 568 and 582-3.

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DEADERICK, C. J., DELIVERED THE OPINION OF THE COURT.

In October, 1872, this bill was filed attaching rents of land conveyed by defendants Cawthorn and wife in trust to secure debts due to Carver, Beaver and others. One Cawthorn was, by the deed, appointed trustee, but the bill alleges that he failed to qualify, etc., and complainant McCall was duly appointed in his stead upon petition of the creditors named in the deed, Carver and Beaver, the complainants, being two of the petitioning creditors whose debts were included in said trust deed.

The deed was executed in January, 1871, and conveyed two tracts of land and some personal property, and stipulates, if the makers should pay the debts enumerated and described, by the 1st of January, 1873, then said deed was to be void; but if the debts were not then paid the said trustee was to sell, on the premises, said real and personal estate, etc.

The deed further stipulates that said Cawthorn, the grantor, retained the power to sell all, or any part, of said property by the permission of the trustee, before the expiration of the trust.

Defendants McWhirter and Norfleet were in possession of the land, and the rents due from them were attached, the attachment issued upon the prayer of the bill, but without any fiat of a judge. It was levied on growing and partly gathered crops of corn and cotton.

McCall in his bill seeks to subject the property attached to the payment of the debts secured in the trust deed *pro rata*, and if this cannot be done then Carver and Beaver pray that it may be applied to their indebtedness.

Defendants demurred and set out numerous causes of demurrer. Upon the cause assigned that defendant Cawthorn had, until the 1st of January, 1873, to pay the debts sued on, the Chancellor sustained the demurrer and dismissed the bill as to complainant McCall, the trustee, but overruled all other causes, retaining the bill as to complainants Beaver and Carver, and both parties, by leave, appealed to this court.

The demurrer raises the question whether complainants had any right to file the bill to recover the rents of the land. Upon the footing of the conveyance in trust of the land, they had no right to the rents of the land, the trustee not having possession thereof.

The purpose of the deed to the trustee, as it recites, was to enable the trustee to sell at a specified time—January, 1873—if the debts were not paid, and the creditors having claimed the benefit of the provisions of said deed in their favor, assent to its provisions, that the debtors shall have until the 1st of January, 1873, to pay the debts received, but they acquired no rights to the rents.

The case cited in 9 Hum. 568 was a bill filed to foreclose a mortgage, and it was held in that case, upon a bill filed for such purpose, that a receiver to collect the rents might be appointed, as all the parties in interest were before the court. But the doctrine that the mortgagee must recover the possession of the land before he can claim the rents was recognized as the rule of law governing other cases.—*Ibid*, 582-3.

In this case the bill does not seek a foreclosure or claim the right of possession, but predicates the claim to the rents upon the legal title to the land for purposes of sale. The demurrer, therefore, should have been sustained.

The decree of the Chancellor overruling the demurrer will be reversed, and the demurrer will be sustained, and the bill dismissed.

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SARAH L. NEAM *v.* WILLIAM E. CAMPBELL, *et al.*

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Jackson, October 28, 1876.

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HOMESTEAD.—RIGHTS OF WIDOW TO.—THOUGH MOVED OFF DURING HUSBAND'S LIFETIME.—RENTS.—The widow is entitled to her homestead, though moved off the land by her husband during his lifetime; but is not entitled to an account for rents against the vendee of the husband, whose possession was during the lifetime of the husband.

AUTHORITIES CITED.—Carter *v.* Notham, *et al.*; Williamson *v.* Wood, MSS., and Hicks *v.* Pepper, MSS. 122544-57,

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M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

The complainant charges in her bill that her husband, John W. Neam, was the owner of a tract of land in Lauderdale county, upon which he resided with his family, consisting of herself and several children; that after the adoption of the Constitution of



1870, he conveyed said land by deed to Wm. E. Campbell and R. C. Parr; that Parr afterwards conveyed his interest to Campbell, and Campbell subsequently conveyed to the defendant, Pugh; that upon the sale by the husband he moved himself and family off the land, and the possession has since been held by the defendant; that after the date of all these conveyances her said husband died intestate; he never acquired any other land or homestead, and that she now has no homestead.

Complainant claims that as she never consented to the alienation of said homestead, that she has a right to be restored to the possession with an account of rents.

The Chancellor overruled the demurrer of Campbell and Pugh, and they have appealed.

The Constitution of 1870 exempts a homestead from sale by execution in the possession of a head of a family, and extends its benefits to the widow and minor children, and further ordains that such homestead shall not be alienated without the consent of the wife when that relation exists; and a subsequent act of the Legislature provides that the consent can only be given by deed duly executed.

We have held, that a wife is not to be deprived of this right, although the husband, during his life, moved away from the land with her and his family, she may afterwards assert her right and be restored to possession. *Carter v. Notham, et al.*, and *Williamson v. Wood*, MSS.

The homestead exemption is not an estate in the land but a mere exemption, and when the widow voluntarily abandons the possession her right is gone. *Hicks v. Pepper*, MSS; but not so where she was moved from the premises by her husband.

The decree was properly overruled as to Pugh, who now is in possession and claims to own the land, but we think the demurrer should have been sustained as to Campbell; he now claims no interest in the land and can only be a necessary party for the purpose of an account of rents, but we think the complainant is not entitled to an account of rents from Campbell, whose possession was in the lifetime of complainant's husband.

We decree accordingly.

## WILLIAM GRIFFIN v. SARAH W. FOWLKES.

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Jackson, November, 1870.

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INSOLVENCY OF ESTATE.—SUGGESTION OF.—PROTECTS ADMINISTRATOR.—WHEN.—In case of default, by administrator to *scire facias* based on suggestion of *devastavit*, to make the administrator personally liable; suggestion of insolvency of estate will defeat such personal liability, if such suggestion is made before such liability became fixed.

AUTHORITIES CITED — Mozier, et al. v. Zimmerman, 5 Hum. 65 6; Acts of 1833-8; Code 2394; Hamilton v. Newman, et al., 10 Hum. 557. *12a 149*,

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FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

The question presented in this case is, whether after a judgment by default, by an administrator, to *scire facias* based on suggestion of *devastavit* to make such administrator personally liable, the fact of suggestion of insolvency of the estate can be interposed to defeat such personal liability.

It is well settled at common law that in such a case the personal liability would be fixed, the judgment being held conclusive evidence of assets. But, under our law for the administration of insolvent estates, it was settled in 1844, in the case of Mozier, et al. v. Zimmerman, 5 Hum. 65-6, that such a plea as we have stated was good against personal liability as for a *devastavit*, where it was interposed before such liability had been fixed by judgment. This decision was based not only on the general provisions of the acts of 1833 and 1838, (now embodied in the Code,) but also on the special provision contained in the 5th section of the act of 1838, providing substantially, that although a judgment may have been rendered against the administrator before the estate had been ascertained to be insolvent, yet he should not be made personally liable by reason of any false pleadings; if the estate be ascertained to be insolvent before such liability is fixed upon him, and the proper steps are taken to suggest the insolvency. See section 2394 of Code.

It is true, there may be cases where the administrator would be precluded from the defence as in Hamilton v. Newman, et al., 10 Hum. 557, where the suggestion was made six years after administration was granted, and the representative had paid out the personal assets on other debts, leaving judgments against him. In cases of this character the defence would not be sustained. But we see nothing of the kind in the case before us, and hold the plea on its face was good, and the court below

erred in sustaining the demurrer to defendant's plea.

The judgment will be reversed and the cause remanded to be proceeded with on the plea of defendant.

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W. P. HALEY *v.* THOMAS S. MOORE.

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Jackson, November, 1876.

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**INTEREST ON JUDGMENTS.—WHEN AND HOW MUCH ALLOWED.**—Section of the Code 3137 *a*, repeals the 12½ per cent. law, and establishes 6 per cent. as the legal interest on judgments; nor is this section confined to cases where the judgment below is affirmed on trial, but extends to cases where certiorari is dismissed, and where by statute the judgment below is affirmed. Reference is made to *Rothchilds v. Forbes*, 2 Heis., and *Smith v. Martin*, 7 Cold.

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M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

We hold that section 3137 of the Code, allowing 12½ per cent. interest upon an affirmance of the judgment of an inferior tribunal, or upon the dismissal of a certiorari is repealed by the act of 1865-6, ch. 17, section 1. T. & S., Code 3137 *a*.

This last named section enacts that: "Judgments or decrees when affirmed in a higher court shall be for the judgment or decree of the inferior tribunal and interest thereon at the rate of six per cent. per annum, instead of 12½ per cent. as now allowed by law." This section is not confined to cases where the judgment below is affirmed upon a trial, but extends also to cases where a certiorari is dismissed, and where, by statute, the judgment below is affirmed. In the case in 2 Heiskell, *Rothchilds v. Forbes*, the 12½ per cent. was allowed, but this was without reference to the act of 1865, which was probably overlooked as was also the case in *Smith v. Martin*, 7 Cold.

We have held, in several cases not reported, that the 12½ per cent. is not allowed.

## General Legal Information.

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It is now three years since the publication of the Supreme Court opinions of Tennessee was first begun as an experiment, under the patronage and for the especial benefit of the lawyers in this State, and until the appearance of this number in magazine form, the publication has been conducted, as it began, in the columns of the *Commercial and Legal Reporter*, under the style of the Legal Department. The first intention was to give merely the decisions of our own court to the members of the Tennessee Bar, but since support and patronage from the legal profession has been so generous, by reason of the necessity of such a work to these gentlemen, it has become requisite, in order to supply the wants of the lawyers in this State, and others in the adjoining States, who have become subscribers, to make the work exclusively *legal* and more general in information concerning the law, hoping thereby to make it such a journal as will meet and supply the wants and wishes of the lawyer exclusively, and every effort will be controlled in this direction.

We will attempt to publish the most recent and important opinions of our own Supreme Court, also furnishing any information concerning the decisions of the Supreme Court of the United States, and of the several States, as may come under our

observation. Notice will also be made of new publications. To have our attention called to matters of legal interest will be a kindness much appreciated. EDITOR.

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WE avail ourselves of this opportunity of giving notice to the Tennessee Bar of the fact that a *complete digest* of all the opinions published in the *Commercial and Legal Reporter* for the last three years, is now being prepared by Mr. J. D. Park, whose ability and accuracy in such work is too well known to the lawyers of this State to require comment. The digest is already in process of publication, and will be given to the public in a few weeks.

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### BOOK NOTICES.

WE have just received 5th Yergers, of Cooper's Edition of the Tennessee Reports. It is well printed and neatly bound; the whole matter has been revised, and much added to in notes and references, invaluable to the profession, by the learned Chancellor Cooper, changing in no wise the original text, unless such alteration be noticed by foot note. To say this work has been edited by W. F. Cooper, and published by the widely-known house of Soule, Thomas & Went-

worth, is the purest criticism we can make of the book and the highest tribute to be paid it.

WE have just received the April and May number of the *Southern Law Review*, a journal that has already established an almost unparalleled reputation with the Bar of the South, for the important and able information which it has been offering to the lawyer, heretofore quarterly. This journal makes its appearance now as a bi-monthly review, and is a highly interesting number. When we find spread upon its pages contributions from the pens of such gentlemen as Wm. F. Cooper, Thos. M. Cooley, LL. D., Joel Prentiss Bishop, Francis Wharton, LL. D., we are confident nothing has been said more than the work justly merits.

A COMMENTARY ON THE LAW OF EVIDENCE IN CIVIL ISSUES. By Francis Wharton, LL. D., author of *Treaties on Conflict of Laws, Medical Jurisprudence, Negligence, Agency, and Criminal Law*. In 2 volumes, volumes I and II. Philadelphia: Kay & Brother, Law Booksellers, Publishers and Importers, 1877. Sold by E. B. Myers, Law Book Publisher, Chicago, and by Callaghan & Co., Law Book Publishers, Chicago.

A TREATISE ON THE LAW AND PRACTICE AS TO RECEIVERS APPOINTED BY THE COURT OF CHANCERY. By William Williamson Kerr, of Lincoln's Inn, Barrister-at-law, with notes and references to American authorities, by George Tucker Bisp-

ham. Second American Edition. Philadelphia: Kay & Brother, 1877. Sold by Callaghan & Co., Law Booksellers, Chicago.

COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA. By Joseph Story, LL. D. Twelfth Edition, carefully revised with notes and new cases added, by Jairus W. Perry, author of the *Treatise on Trusts*, in 2 volumes. Boston: Little, Brown & Co., 1877.

WE have just received the April issue of *The Southern Review*, edited by Bledsoe & Herrick, 34 McCulloh St., Baltimore, and to say that this number, in the ability of its articles and selection of subjects, is equal to any of its precedent issues, pays the work a compliment indeed.

Some of its contents are: "Women of the Southern Confederacy," "Life and Letters of George Ticknor," "Plymouth Brethrenism," "Examination of Edwards on the Will," by the editor, A. T. Bledsoe, LL. D.

#### ABSTRACTS.

COMMON CARRIER NOT EXEMPT FROM LIABILITY.—WHEN.—U. S. Supreme Court, October Term, 1876. *President of Bank of Kentucky v. Adams Express Co.* Express companies are liable for losses caused by the negligence of the employees of railroad companies over which said express companies have shipped the money; notwithstanding the express company has stipulated in

a bill of lading given to the sender of the package, to the effect that the company was exempt from liability, where losses are occasioned by "the dangers of railroad transportation, or by ocean or river navigation, or by fire or steam."

**CONVERSION OF MONEY.—LARCENY.—WHEN.**—Court of Appeals of New York. *Loomis, plaintiff in error v. The People, defendant in error*. Where money is fraudulently obtained, for only a temporary purpose, and is handed over for a specific use with no intention to loan it or surrender the title. Held, there was no intention to part with the ownership or possession of the money, its conversion was a clear case of larceny.

**CONTRIBUTORY NEGLIGENCE.—FIRES BY RAILROADS.**—Supreme Court of Kansas, January Term, 1877. *K. P. R. R. v. Brady, et al.* If hay be stacked near a railroad, with dry grass intervening, without any pains being taken to protect it from fire. Held, the owner is guilty of contributory negligence and can have no recovery. The question of negligence is a fact for the jury and not a question of law for the court.

**MORTGAGE.—RECORDED BUT NOT INDEXED.—RIGHTS OF MORTGAGEE UNDER.**—Supreme Court of New York. *Mutual Life Insurance Co. v. J. M. Dake*. Held, although a registered mortgage be not indexed, the rights of the parties holding such mortgage are not impaired thereby, and entitles him to priority and superior satisfaction to other

and subsequent innocent mortgagee.

**AUTHORITIES CITED:**—*Dodge v. Potter*, 18 Bar. 193; *Dikeman v. Puckhofer*, 1 Abb. Pr., N. S., 32; *Carter v. Lyman*, 24 Vt. 338; *Bishop v. Schneider*, 46 Mo. 472.

**BROKER'S COMMISSION.**—Supreme Court of Pennsylvania, 34 Leg. Int. 49. *Reed v. Reed*. 1. When a broker, authorized to sell at private sale, has commenced a negotiation, the owner cannot, pending the negotiation, take it into his own hands and complete it either at or below the price limited, and then refuse to pay the commission. 2. Plaintiff's right to recover commission for making sale is not affected by the fact that he was to be one of the purchasers, if he acted openly and fairly.

**CASES CITED:**—*Kys v. Johnson*, 18 P. F. Smith, 42; *Edwards v. Goldsmith*, 4 Harris, 43; *Taylor v. Salmon*, 4 Myne & Craig, 139; *Bollman v. Loomis*, 15 Am. L. R. (N. S.) 75.

**SEWING-MACHINE SOLD ON CONDITION.—REPUGNANT AGREEMENT.—WHEN WRITTEN CONTRACT MAY BE VARIED BY PAROL EVIDENCE.**—Supreme Court of Minnesota, 9 Ch. L. N. 163. *Domestic Sewing Machine Co. v. Anderson*. 1. The rule forbidding the use of parol evidence to affect a written instrument, does not apply to a case in which a part only of the dealing between parties, in respect to a particular subject-matter is reduced to writing, except as respects such fact. 1. In case of an absolute sale and delivery of personal property, an agreement by the purchaser

to pay the vendor for the future use of the same, or to deliver it up to him on demand, is repugnant to the contract of sale and is void. The receipt of the property by the purchaser furnishes no valid consideration for such agreement.

**PROXIMATE CAUSE—FIRE COMMUNICATED BY RAILWAY LOCOMOTIVE.**—*Pennsylvania Railroad Co. v. Hope.*—Spark from defendants' engine fired a railroad tie, from which rubbish left by the defendants on their road was fired, communicated with plaintiff's fence next to the road. *Held*, that the proximity of the cause was for the jury. In such case the jury must determine whether the facts constitute a continuous succession of events so linked as to be a natural whole, or whether the chain is so broken as to become independent, and the final result cannot be said to be the natural and probable consequence of the negligence of defendants. The rule for determining what is proximate cause is, that the injury must be the natural and probable consequence of the negligence, and that it might and ought to have been foreseen under the circumstances. (*Pennsylvania Railroad Co. v. Kerr*, 12 P. F. Smith 353, distinguished.)

**NEGLIGENCE.—FIRE SET BY SPARKS FROM LOCOMOTIVE.—CONTRIBUTORY NEGLIGENCE.**—*Phila. & Read. R. R. Co. v. Hendrickson.* Where a barn, quite near the track of a railroad, was negligently burned by sparks from a locomotive. *Held*, not evidence of contributory negligence that the

owner suffered the roof to be in such condition as that it was more liable to take fire than if it had a secure and safe roof.—*Albany Law Journal.*

**MUTUAL DUTIES OF LANDOWNERS AND RAILROADS.**—*Ib.*—The owner of property near a railroad must take all risks of a proper and careful use of the road. When a railroad company uses the most approved spark arresters, and proper care and vigilance in running its engines, an adjacent landowner has no remedy for injury to his property by fire thrown from a locomotive. Where actual negligence in running an engine is proved, and loss results, the mere condition of the landholder's property is no defence. In order to hold a landholder for contributory negligence, where injury is done to his property by fire from an engine on a railroad, he must have done some act or omitted some duty which is the proximate cause of the injury occurring with the negligence of the railroad company. Farmers may cultivate and use their farms and improvements as is customary amongst farmers, and are not bound to exercise unusual means to guard against the negligence of railroad companies.—*Albany Law Journal*

**MARRIED WOMAN'S LAND.—SEPARATE ESTATE.**—Supreme Court of Missouri, Oct. Term 1876. *Burnley v. Thomas.* A conveyance to a trustee for the sole use of a married woman and her children, to the exclusion of the husband, during her natural life, and upon her death, to

her children in fee, with power in her to sell and convey through her trustee, and re-invest proceeds of sale in other lands, subjects to like limitations, gives the married woman a separate estate, chargeable in equity with the payment of a note executed by her. *Metropolitan Bank v. Taylor*, 53 Mo. 444; *Nat. Bank v. Robidoux*, 57 Mo. 546; *Metropolitan Bank v. Taylor*, 62 Mo. 338. The court declines to express any opinion as to how far reversionary (or present) interest of the children could be affected by judgment and sale.—*Central Law Journal*.

**NUISANCE OF CHURCH BELLS.—COMMON PLEAS.** — Philadelphia. *Harrison, et al, v. St. Mark's Church*. As the atmosphere cannot rightfully be infected with noxious smells or exhalations, so it should not be caused to vibrate in a way that will wound the sense of hearing. Noise caused by the ringing of church bells, if sufficient to annoy and disturb the residents of the neighborhood, in their houses and occupations, is a nuisance and must be enjoined.—*Albany Law Journal for March 31, 1877*.

**MORTGAGE OF CROPS NOT YET PLANTED. — INVALID.** — Supreme Court of Georgia, Feb. 27, 1877. *Redd v. Bowers*. There can be no valid sale or mortgage of a portion of a crop not planted; therefore, an obligation dated the 25th of December, 1874, to deliver certain cotton of the next year's crop, the crop of 1875, passed no title to the obligee.

**CERTIFICATE OF DEPOSIT.—WHEN NEGOTIABLE.**—Supreme Court of North Carolina, Jan. Term, 1877. *Johnson v. Henderson*. 1. Certificates of deposit are negotiable, *when expressed in negotiable words*; and their transfer to the endorser is governed by the same rules which control other promissory notes, the liability of the endorser being the same as upon the endorsement of such promissory notes. 2. To make a bill of exchange or promissory note (or certificate of deposit) negotiable, the promise must be to pay in money. And unless the instrument, on its face, affords every element to fix its value, such a paper is only a special contract, and is not negotiable. Hence, a promise to pay in "bank stock," in "current bank bills," or in "current funds," will render the instrument unnegotiable.—*Central Law Journal*.

**JUDGMENT.**—Assignment of half a judgment, without consent of judgment debtor, will not authorize assignee to collect the portion assigned; debtor may in such case satisfy the entire judgment to assignor, and the assignee will be enjoined from collecting, by execution, the moiety assigned.—*Burnett v. Crandell* (with note), Sup. Ct. Mo., Mar. 9, p. 230.

—Promise to pay a debt discharged by bankruptcy valid; but, if conditional, creditor must show the happening of the condition.—*Ecklar v. Galbraith* (with note), Ct. App. Ky., Am. L. Reg., Feb., p. 70.



THE  
Tennessee Legal Reporter.

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NEW SERIES.

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*DECISIONS OF THE SUPREME COURT,*

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VOL. I.      NASHVILLE, TENN., JUNE, 1877.      No. 2.

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WM. F. CRAWFORD, AND WIFE, MARTHA A., v. CRAWFORD & THOMPSON.

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Jackson, November 25, 1876.

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1. JUDGMENT.—CANNOT BE INQUIRED INTO.—WHEN.—A judgment of a court having jurisdiction of the persons and the subject-matter, is conclusive between the parties as to the matter in controversy and cannot be inquired into, if unappealed from, unless it was obtained by fraud, accident or mistake.

2. JUDGMENT AGAINST MARRIED WOMEN.—A judgment against a married woman is not void, although it be based upon a contract she was not competent to make, and is still binding upon her until set aside by appeal or other appropriate methods.

3. HOMESTEAD.—RIGHT TO.—EXISTS.—WHEN.—Where a debt is contracted before the homestead act of 1868, and a note is given for the same, subsequent to that time, no right to homestead is created thereby.—[ED.]

CASES CITED.—8 Yerg. 186; 1 Yerg. 296; 4 Hum. 174; Freeman on Judgments, 149 and 150; 1 Ch. P. 476-7 and 449; 1 Ch. P. 83-4; 2 Tenn. R. 176.

DEADERICK, C. J., DELIVERED THE OPINION OF THE COURT.

Complainants filed their bill in May, 1874, in the Chancery Court at Bolivar, to enjoin the sale of the wife's life estate in a tract of land upon which they were living.

Defendants, in 1867, as merchants and partners, sold goods to complainant, Martha A., and in August, 1869, she executed her note therefor, and in November, 1873, they obtained a judgment against complainants for about \$252 on said note before a justice of the peace for said county.

Execution was issued thereon and levied upon the land as above stated, returned with the papers into the Circuit Court, and the land was condemned and ordered to be sold and was advertised for sale, when the bill was filed in which complainants state that said Martha A. was a married woman when the account was made and the note executed, and that the note was therefore void, and also the judgment thereon; and that she was the head of a family in the possession of the land levied on with her husband; and that she was entitled to have the homestead to the value of \$1,000 exempted from sale, and sought a decree to this effect.

Defendants demurred to the bill, upon the ground that the validity of the justice's judgment could not now be inquired into, and that complainants had an unembarrassed remedy at law by appeal from the judgment, of which they might have availed themselves; and that a life estate in the wife was not the subject of the homestead under our statutes.

The demurrer was sustained as to the first ground stated and overruled as to the second, the defendants being required to answer the bill as to the claim of homestead.

An answer was filed and depositions taken, and upon the hearing, the Chancellor held that the complainants were not entitled to the homestead exemption and dismissed their bill, from which decree they have appealed to this court.

A judgment of a court having jurisdiction of the persons and subject-matter, is conclusive between the parties as to the matter in controversy in the case, and cannot be inquired into or questioned, if unappealed from, unless it was obtained by fraud, accident or mistake. 8 Yerg. 186; 1 Yerg. 296.

Such a judgment, unless set aside, is final as to the subject-matter of it, to all intents and purposes, no matter how unjust it may be. 4 Hum. 174.

The defendants having had opportunity to make defence, are precluded in a court of chancery from setting up defences there,

which were peculiarly appropriate to be made in a court of law, and which they had opportunity to make. In the cases cited, the parties were all *sui juris*, but we are not aware that a rule of such general application can be held to except from its operation any party who, having a plain and unembarrassed remedy at law, neglects to interpose it.

In Freeman on Judgments, it is said that a few of the courts reasoning from the hypothesis that a judgment was a contract, have held that a party incompetent to contract, could not be bound by a judgment. After citing cases of the character referred to, the author proceeds to say that the preponderance of authority is in favor of the rule that a judgment against a married woman is not void; and when erroneous because based upon a contract she was not competent to make, or from any other reason, it is still binding upon her until set aside upon appeal or by other appropriate methods. Sections, 149-150.

The rule in all its force, and with all the reasons for it, applies to all such parties as have the remedy and the opportunity to use it.

In an action of assumpsit, under plea of the general issue, which is a denial of having made the contract alleged in the declaration, although the contract was in fact made, the defendant may give evidence of incapacity to contract because of infancy, lunacy, coverture, etc., existing at the time of the supposed contract. But coverture taking place since the making of the contract, must be pleaded in abatement. 1 Ch. P. 476-7.

In an action of debt upon a bond or specialty of any kind under the plea of *non est factum*, the defendant may give evidence that she was a married woman or lunatic, etc., at the time of executing the instrument. 1 Ch. P. 83-4.

Now it is laid down by Mr. Chitty, that coverture at the time when the supposed contract was entered into must be pleaded in bar, though before the recent rules relating to pleadings, (4 W. 4,) it might have been given in evidence under the general issue *non assumpsit* or *non est factum*. 1 Ch. P. 449.

In an early case it was held by this court, that facts rendering an act absolutely void may be proved either with or without plea, but those rendering the act avoidable only must always be pleaded. 2 Tenn. 176.

These rules, applicable to suits against married women, lunatics, infants and persons under duress, show the necessity of pleading several facts and defences necessary to defeat the action brought.

We are of opinion that the judgment against complainants is not void as to either of them; that, having failed to make their defence at the proper time, a court of equity can give no relief.

The debt was contracted in 1867, before the passage of the act of 1868, although a note was executed in 1869 for it, and we are of opinion that the complainants are not entitled under the act of 1868 or the act of 1870, to the exemption of the homestead as claimed in their bill; and therefore, we affirm the decree dismissing it.

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J. H. SMITH v. LUCIEN B. LEONARD.

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Jackson, October 7, 1876.

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GARNISHMENT.—ANSWER OF GARNISHEE.—CONCLUSIVE WHEN.—AND AS TO WHOM.—The answer of a garnishee, in cases involving more than \$50.00, is conclusive as between garnishee and garnishor *only*, and not as to *strangers* to the litigation; and unless it appear to the court that the effects or money in the hands of the garnishor are *liable* to the plaintiff's debt, the garnishee will be discharged.—[Ed.]

CASES CITED.—Conner v. Allen, 3 Head, 424; Code 3103, 3092, 3094 and 4236.

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SNEED, J., DELIVERED THE OPINION OF THE COURT.

A constable of Haywood county, having an execution in his hands in favor of J. H. Smith against H. B. Smith, served a garnishment on the defendant, Leonard, to have a disclosure of his indebtedness to said execution debtor. The defendant, Leonard, appeared before the justice on April 24, 1873, and answered in these words: "I have this day purchased of said H. B. Smith, two bales of cotton amounting to \$124.57, which amount I owe him.

The justice rendered judgment discharging the garnishee, upon certain facts produced in evidence before him touching the ownership of the cotton, and the plaintiff appealed to the Circuit Court, where the matters in controversy were submitted to the court without the intervention of a jury, and the court gave the plaintiff a judgment against the garnishee for the amount thus admitted to be due in his answer.

The defendant, H. B. Smith, appealed in error. Upon the trial, it was admitted by the plaintiff that the cotton so purchased of H. B. Smith by Leonard, the garnishee, was raised on the land of Sarah Smith, the wife of said H. B. Smith; that the said land was the separate estate of the said Sarah; that the said cotton was cultivated and raised by the labor of the said Sarah, with the aid of her children and two hired servants; picked out by her and her children, and hauled to a neighboring gin where it was ginned and baled; that she sent it to Brownsville by her said husband, H. B. Smith, as her agent to sell, and with the proceeds to purchase certain supplies for herself and children, and to return the balance of the proceeds to her. That the said H. B. Smith sold the cotton to the garnishee, Leonard, and that the fund in controversy was the proceeds of said cotton. It was agreed that witnesses should testify to these facts under the plaintiffs exceptions to the relevancy of said testimony, and the facts were accordingly established by proof. The circuit judge being of opinion that the answer of the garnishee was conclusive upon all parties, held the testimony irrelevant and rendered judgment against the garnishee and in favor of the plaintiff.

We think this judgment was erroneous. Our statute provides that in such cases where the amount in controversy is less than fifty dollars, the answer of the garnishee is not conclusive, but the *plaintiff* may controvert any of the facts contained therein. Code, section 3103.

On the other hand, it has been held in many adjudged cases, that if the amount in controversy be more than fifty dollars, the answer of the garnishee is conclusive. But whom does it conclude, and as to what is it conclusive? It is only conclusive as between the garnishor and garnishee, and not as to a stranger to the proceeding. *Conner v. Allen*, 3 Head, 424. If the garnishee answer that he has effects of the debtor in his hands, and the fact is so, the plaintiff is entitled to judgment. If he answer that he has not, the garnishee must be discharged. Was it intended by the rule that a third party might not intervene and show that the answer of the garnishee was founded in a mistake of fact, and that the money which he discovers as being in his hands and which he believes to be the money of the execution debtor, was, as a matter of fact, not his money, but that of some third person? Certainly not. Such a construction of the rule would be prolific of wrong and injustice, and cannot upon any principle be supported. In this case all the parties in interest are be-

fore the court, the plaintiff and the garnishee in person, and Mrs. Smith, the alleged owner of the fund by her agent, and there is no necessity for a resort to any other forum to determine the rights of the parties. The inquiry before the court in the words of the statute, are the effects discovered by the answer "liable for the plaintiffs' debt?" Code, 3092.

So soon as the property is declared to be the property of the defendant, says the statute, it shall be delivered up to the officer serving the garnishment. Code, section 3094. The policy of the law is to prevent a multiplicity of suits, and in aid of this policy, we have a special statute that requires of the Circuit judge to adjudge certain cases upon equitable principles, without troubling the parties to resort to a special forum of equity jurisdiction. Code, section 4236. Whether this case is technically within the purview of that statute it is not necessary to determine. We do hold, however, that in this as in all like cases, it must appear to the court that the effects or moneys discovered by the answer of the garnishee are in the language of the statute "liable to the plaintiffs' debt." The doctrine that the answer of the garnishee is conclusive as between himself and the garnishor does not authorize the impounding of the property or money of a third party to pay the plaintiffs' debt; and of this the court must be satisfied. If it turn out that the garnishee is mistaken as to the ownership of the money, then he must be discharged.

Let the judgment be reversed and final judgment entered here discharging the garnishment.

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### W. W. MOORE v. YOUNG B. McLEMORE.

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Jackson, November 25. 1876.

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**WITNESS FEES.—WHEN ALLOWED.**—While a witness is not bound to attend after final judgment has been rendered in the case, and incurs no forfeiture for failure; nevertheless, having been originally summoned, he is entitled to prove his attendance without being re-summoned after a new trial granted, or after the cause has been reversed and remanded by the Supreme Court, if he continues to attend on the original subpoena.

A witness not summoned but attending, cannot have his fees taxed in the bill of cost; but the fact that there is no subpoena on file is not conclusive evidence that the witness has not been summoned.—[Ed.]

**AUTHORITIES CITED.**—2 Yerg. 230 and 423.

DEADERICK, C. J., DELIVERED THE OPINION OF THE COURT.

Our attention has been called to several motions which in the disposition of this cause at this term were overlooked.

After the trial of this cause in the Circuit Court, the attorney for defendant, McLemore, moved the court to disallow in the taxation of costs, any costs for attendance of certain named witnesses because absent at the trial term. This motion was as to part allowed and disallowed as to others who were present, and we see no error in the action of the court in this respect.

The defendant entered a further motion that the clerk be directed not to tax in the bill of costs the fees of any witnesses accrued since the former trial, unless such witness had been re-summoned since said former trial. But the circuit judge held, if such witness had been summoned before the former trial, and had since attended as a witness, he would be entitled to his attendance. There was no error in this holding. While a witness is not bound to attend after a final judgment has been rendered in the case and incurs no forfeiture for failure, nevertheless, having been originally summoned, he is entitled to prove his attendance without being re-summoned, after a new trial granted, or after the cause has been reversed and remanded by the Supreme Court, if he continues to attend on the original subpoena.

The defendant further moved that the clerk be directed to tax the fees of no witness who is not shown by subpoena on file to have been summoned. This motion was also properly refused. A witness not summoned, but attending, cannot have his fees taxed in the bill of costs, but must look to the party for his fees who requested his attendance. 2 Yerg. 230.

But the fact that there is no subpoena on file is not conclusive evidence that the witness has not been summoned. It may have been lost or destroyed after service. A witness may prove his attendance notwithstanding there may be no subpoena on file with the papers in the case.

And, after a witness has proved his attendance, it was held by this court that it will be presumed the record justified it. 2 Yerg. 423.

There was no error in the rulings of the circuit judge upon the several motions, and his action thereon is affirmed.

THOMPSON v. ANDERSON, *Administrator*.

Jackson, September Term, 1876.

**EVIDENCE.—COMPETENCY.—SUIT AGAINST ADMINISTRATOR.**—In a suit against an administrator, in which judgment may be rendered for or against him, the plaintiff is not allowed to testify against the defendant, as to any transaction with or statement by the intestate, unless called to testify thereto by the opposite party, or required to testify thereto by the court. Code, section 3813.

**EXCEPTION TO TESTIMONY.—MODE OF.**—If testimony contravening the above rule is admitted by the court, and excepted to by the defendant in these words: *Shear* "To all which testimony defendant excepted, as being evidence concerning conversations and transactions between witness and deceased. *Held*, the exception was sufficiently explicit and pointed.

How the "requirement to testify" should be made by the court in any case, is not a settled matter of practice; but the court sees no objection to the practice of making application to the court to require the evidence, supported by affidavit, of its materiality in the case.—[Ed.]

**CASES CITED.**—Code, section 3813; Mount Olivet Cemetery v. Shubert, 2 Head, 117.

## SNEED, J., DELIVERED THE OPINION OF THE COURT.

The plaintiff was the sister-in-law and ward of the defendant's testator in his lifetime, and brought this action to recover the value of certain household services rendered by her in the family of defendant's testator, between the months of June, 1862, and June, 1870. The verdict and judgment below were for the plaintiff. The defendant appeals in error.

The plaintiff was introduced as a witness in her own behalf, and was objected to as a witness, on the ground that the suit was against the estate of a decedent and she was a party, and under the statute was an incompetent witness. The circuit judge overruled the objection, stating that he would exclude any testimony of her's coming within the prohibition of the statute. The witness then testified substantially, that she went to live with Judge Thomas James, defendant's intestate, about the 20th June, 1862, that Judge James had just before that time married her sister; she continued to reside with him until the death of her sister about the first of June, 1870; that Judge James invited her to come and live with him, saying that his house would be a home for her; that it would cost her nothing, and that she would have to pay board elsewhere. Judge James was her guardian. She did not expect to pay board, and Judge James told her she should not have to pay board. He afterwards charged her board for the entire time, with the exception of about five months, during which time she was absent. He charged her part of the time \$15.00 per month, and part of the time



\$20.00 per month. This charge was made in a suit for the settlement of his guardianship accounts, and the amount obtained out of her patrimony. About the time she went to live with Judge James his servants left him, and it was quite difficult to obtain others. When he had none, or an insufficient number, she performed the duties of a servant in everything pertaining to household affairs; that during most of the time she lived with Judge James, his wife was in ill health, and the witness exercised a general supervision over the domestic affairs of the family, and the sewing and attending to the children. That her services during the entire time were worth \$25.00 per month. Sometimes he could not have gotten servants at any price. She did not think anything about charging Judge James for her services at the time; she did not know that she would have brought this suit, if she had not been informed by her counsel that Judge James had been charging her board all the while she was in his house, and that he had paid himself out of her patrimony, which came into his hands as her guardian. She did not know this until after the death of Judge James, and did not know what her legal rights were until advised by her counsel, who told her she ought to bring this suit.

She would have rendered the services here sued for, to her sister through affection for her, whether she had gotten any pay or not. After the death of Judge James' wife, and during his last illness, she returned to his home, and waited on him for several weeks before his death, and after his death she took his youngest child, then two years old, and kept it until its own death, which occurred some months afterwards.

The defendant's exception to this testimony was entered of record as follows: "To all which testimony defendant excepted as being evidence concerning conversations and transactions between witness and deceased." The court overruled the exception and made no order excluding any part of it, but suffered the whole to go to the jury.

It is insisted that the court erred in overruling the exception. The statute upon which the exception is predicated is in the words following: "In actions or proceedings by or against executors, administrators or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify for or against the other, as to any transaction with, or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." Code, Sec. 3813, *d.*

It is clear, that a portion of the testimony above quoted was

of statements by and transactions with the intestate, that had a material influence in bringing about the verdict. It is clear also, that the witness was not required to testify thereto by the court. And how this requirement should be made in any case is not a settled matter of practice under the statute. It is said on behalf of the plaintiff, that "it would seem absurd to hold it is error in the court to permit what it has a right to compel."

We do not understand the statute as contemplating that the court, whose simple province it is to poise the scales of justice between the parties, should become a partizan in the case, and require testimony to be adduced for or against either party, without some formal demand for it by the party.

We see no objection to the practice which we observe is growing up in the Circuit courts, for the party wishing such testimony to make application for it, supported by affidavit as to its materiality in the cause.

It is said in this case that the exception does not point out the particular portion of the testimony objected to, and that it is too general to require any notice.

In support of this view the case of Mount Olivet Cemetery v Shubert, 2 Head. 117 is cited. In that case it was held that if a deposition contain matter that is relevant and competent and that which is incompetent, an objection to be available must be specifically made to such parts as are incompetent. A general objection to the reading of the deposition, will not do.

The defendant's exception to the testimony in this case is, as we have seen, in these words: "To all which testimony defendants excepted as being evidence concerning conversations and transactions between witness and the deceased. This is not a general exception in the sense of the decision referred to. The statement of the specific grounds of exception takes it out of that category. The court under such an exception should have excluded all that portion of it obnoxious to the specific exception taken by defendant. There are others more relied upon, but this must reverse the judgment, and upon the other questions we express no opinion.

Reverse the judgment and award a new trial.

## A. J. POWELL v. W. J. WARREN.

Jackson, November 3, 1876.

**CREDITORS OF HUSBAND.—RIGHTS OF AGAINST ALIMONY.**—Alimony cannot be assigned to the wife upon granting her a divorce, so as to defeat the claims of the existing creditors of the husband at the time the wife's suit for divorce was commenced.

**COURT OF EQUITY.—JURISDICTION.**—When real estate, subject to the debts of the husband, has been assigned to the divorced wife for alimony and she put in possession thereof, a creditor who has recovered judgment against the husband and had execution returned *nulla bona*, may come into equity and have a decree for the sale of the land.

**HOMESTEAD.**—The creditor in such case cannot reach the homestead or other property exempt from execution; his rights are only those he might have had against the property in the hands of the husband before the decree for divorce.

## FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

Complainant obtained two judgments on 6th of April, 1874, against George Warren, on notes given 6th of February, 1874; said judgments were before a justice of the peace. The notes were given for the amount of an account previously made by said Warren, for groceries sold and furnished to him. Executions were issued and returned *nulla bona* on both judgments. George Warren had been the husband of Mrs. Mary Warren, the defendant. On the 10th of February, 1874, Mrs. Warren filed her petition in the Circuit Court of Hardeman county for a divorce, and on 23d of March after, obtained a decree of separation from her said husband, dissolving the bonds of matrimony. In that decree alimony was assigned, and among other things the house and lot on which she resided and now in controversy. Said decree recites that Warren had purchased the house and lot with means derived from his wife; we may fairly assume with money so derived, as it is recited she had money, negroes and land amounting in all to some \$15,000, at the time of marriage. This, however, is not very important. It is further recited that Warren had no other property and assets than those attached in that case.

Complainant, after the return of the executions *nulla bona*, filed this bill, alleging the above facts substantially, and that while Warren might have some money and notes, complainant could not find it out if he had; therefore, he alleged he had no other property out of which he can have his debts paid, except the property decreed defendant for her alimony, and further, that it is believed the land can be laid off into lots and enough sold to satisfy this debt without selling the improvements. The

prayer of the bill is to sell said property to pay the debt, and for general relief.

A demurrer was filed by defendant, which was overruled by the Chancellor, and appeal to this court.

We have examined carefully the able and ingenious argument filed by counsel in support of the demurrer, but fail to find anything in it on which we can reverse the decree of the Chancellor.

It has long been settled in this State, that alimony could not be assigned to the wife in such cases so as to defeat the claims of the existing creditors of the husband at the time of the commencement of the suit of the wife. See *Allen, et al. v. McCullough, et al.*, 2 Heisk. 176; *McGhee, et al. v. McGhee*, 2 Sneed 223, and other cases that might be cited. We deem this too well settled to require additional discussion. It is based on sound principle as well as authority.

The creditors could not be affected in any way by the decree in the divorce suit, not being parties thereto. The wife must necessarily take what she procures by that suit, subject to their prior claims.

We think a bill might well be filed in a case like this to reach the property, encumbered as it was in the possession of the divorced wife, and decree vesting it in her as alimony. It is eminently proper that this encumbrance be out of the way before a sale of the property, and probably for the interest of all parties, to prevent its being sacrificed by being sold thus encumbered; as a matter of course, the creditor cannot reach the homestead or other property exempt from execution; his rights are only those he might have had against the property in the hands of the husband before the decree for divorce.

There is no other question necessary to be noticed in this case. We therefore affirm the decree of the Chancellor with costs, and remand the case for further proceedings.

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N. M. TREZEVANT *v* T. C. BETTIS, *et al.*

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Jackson, December 9, 1876.

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**LIEN.**—HOW IT MAY BE CREATED.—Where a lien is reserved on the face of a deed conveying a lot of land to secure a sum of money due to the vendor, the

lien is good as between the vendor and vendee and their representatives, although the money constituted no part of the consideration for the land, and the deed was not signed by the vendee. *3 La 632*

ESTOPPEL.—The vendee, by accepting the deed, is estopped from disaffirming the charge contained in the face of it.—[Ed.]

AUTHORITIES CITED.—3 Head, 328; 2 Swann, 648. *3 La 632,*

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FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

This bill is filed to enforce a lien reserved in a deed conveying a lot of land near the city of Memphis, to A. C. Bettis. It is filed against his widow, administratrix and heirs. The deed was made by complainant and Amanda Trezevant. The lien retained on the face of the deed was for payment of a \$1200 note due N. M. Trezevant, was probably for borrowed money, but no part of the consideration for the land. It was not signed by the vendee.

The only question in the case is, whether such a lien is binding, creating a valid charge on the land as between the vendee, or rather, between the original parties or representatives. The Chancellor held it good, and we think correctly. The acceptance of the deed by Bettis was an assent to the right reserved on its face, and he as well as his heirs is estopped from saying that he will take the benefit of the title and disaffirm the charge thus created by the terms of the contract. Such reservations of estates have been held good in 3 Head, 328; 2 Swann. 648.

What might be the effect of this reservation as against creditors and purchasers under our registration laws may be a different question, but as to the parties to the instrument there can be no question of the validity and binding force of the lien thus reserved.

The decree will be affirmed, the money must be paid in ninety days or the land sold for its payment; and if any balance, then decree against the administratrix for it, to be levied of assets of the estate. Costs paid out of the fund, and to be paid in cash at sale, not to affect the bar of equity of redemption.

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W. C. HOLT AND TIMOTHY DOWLING v. JOHN M. STRAIN AND R. M. STRAIN.

Jackson, November 25, 1876.

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JOINT SURETIES.—RIGHT OF SUBSTITUTION.—Where a creditor has a judgment against two joint sureties, which is a lien upon the land of one of them, and

the other pays off the entire judgment, the latter surety is substituted to the rights of the creditor to enforce the said lien for one-half of said judgment.—[Ed.]

CASES CITED.—Bothick v. Williams, 7 Heis. 307; Leading Cases in Eq. 160.

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M<sup>r</sup>FARLAND, J., DELIVERED THE OPINION OF THE COURT.

At the January Term, 1871, of the Gibson county Circuit Court, M. E. Bowen and wife recovered a judgment against the complainant, Holt, and the defendant, J. M. Strain, as the sureties of one Hayne, the former guardian of Mrs. Bowen, for upwards of \$1,000, which was paid off by the complainant, Holt. He filed this bill against J. M. Strain for contribution, and also to reach a tract of land which said J. M. Strain conveyed to his son R. M. Strain, for satisfaction, it being alleged that the conveyance was fraudulent. It was, however, subsequently admitted that the conveyance was free from fraud; that it was executed at the time it bears date, in 1869, but not registered until 22d February, 1871, after the judgment of Bowen and wife, "*and that said judgment was a lien on said land.*"

The Chancellor rendered a decree in favor of the complainants against J. M. Strain, for one-half of said judgment and interest, but refused to hold the land conveyed to R. M. Strain liable, and dismissed the bill as to R. M. Strain. The complainant has appealed, and the question argued is, whether the complainant Holt, is entitled to be substituted to the lien of Bowen and wife, given by the statute on the lands of J. M. Strain, he, complainant, having paid off the judgment. That he would be entitled to be substituted to such lien on the property of his principal seems clear, and it is also settled by authority that the same rule applies as between sureties. See Bothick v. Williams, 7 Heisk. 307, and authorities there cited, and Lead Cases in Eq., p. 160. This relief was not specially prayed for, but the bill states facts upon which the right to the relief arises and there is a prayer for general relief.

The decree must therefore be reversed, and a decree rendered for the complainant with costs.

WITHERSPOON, *et al.* v. PORTER, *et al.*

Jackson, October 31, 1876.

**WARRANTY.**—Where title bond described the land in these words: "Known as Wolf Island tract, lying in the Tennessee river between Savannah and Crump's Landing, and containing 214 acres less tide washes. *Held*, to be no warranty that the island should contain 214 acres.

**PAROL EVIDENCE.**—Parol evidence may be looked to, to determine whether a sale of land was intended to be by the acre or in gross.—[Ed. *7 de n. 117*]

FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

This bill is filed to have an abatement of the purchase money, on account of a deficiency of about 105 acres in a tract of land purchased by complainants, known as "Wolf Island."

The island is situated in Tennessee river, and was supposed to contain 214 acres. Two other tracts of land were sold at the same time by E. W. Porter to complainants, one supposed to contain 800 acres, and another 100 acres, situated on the mainland hard by the island tract. These three tracts were represented to and supposed by the parties to contain the number of acres stated, in all amounting to 1,114 acres. The price agreed to be paid was \$13,925, a part of which was paid in cash, and notes given for the balance.

The bill charges, that Porter represented the island tract to contain 214 acres; that complainants were unacquainted with the land or nearly so, and that they relied on the representations of Porter; that they were induced to place confidence in Porter's statement by the endorsement of his high character, given by Mr. Walker, who was the agent for the lands, with whom they were well acquainted.

They allege that they bought the land by the acre at \$12.50, and not in gross; and in a word, relied on the statements of Porter for a correct statement on this subject.

Porter died before the commencement of this suit. The bill is answered by his representatives, claiming, from information and belief, that the land was sold in gross and not by the acre.

A title bond was given by Porter which has been lost, but is supplied by proof, and we take it correctly, especially as to the Wolf Island tract. The terms of this bond as to this tract are as follows, after stating the fact of the sale of the other tracts, its language is: "The first, known as the Wolf Island tract, lying in the Tennessee river between Savannah and Crump's

Landing, and containing 214 acres, less tide washes;" by which we take it, is meant less any loss from washing caused by the tides or currents of the river. The other two tracts are described as we have stated, with the addition as to the acres, "more or less."

From the face of the contract, it is clear there is no warranty or stipulation on the part of Porter, that the island should contain 214 acres. For the deficiency, whatever it might be, no action at law would lie as for breach of covenant.

Such is the rule definitely laid down in the case of *Allison v. Allison*, 1 Yerg. 16, and other cases in our State. The rule is thus stated in a dicta by judge Caruthers in *Bently v. Miller*, 5 Sneed 674-5; "where the boundaries are given correctly in the contract of sale, and there is no stipulation as to quantity nor any fraud, it is a sale in gross, and no deduction in the price can be made for deficiency in quantity." The case standing on the title bond alone under this rule, the complainants would be repelled, for the land, being an island and so described, its boundaries were known to the parties, and there is clearly no stipulation or warranty that this "island" shall contain the number of acres stated.

But it is said by this court in the case of *Barnes v. Gregory*, 1 Head, A. 237. This contract is silent as to whether the sale was by the acre or in gross, and we add that this bond only fails to show a sale by the acre from its face and has no guaranty as to quantity. This fact, says the court in the above case, may be made out by parol or extrinsic evidence, such evidence may be looked to, it is held, and that the uniform course of decision gave relief in such cases where there was a substantial deficiency; that is, in cases where the sale was thus shown to have been by the acre, and even in cases of sales in gross where there was fraud or imposition." *Ibid.*

The same rule is held to apply in favor of the vendor where there is an excess, for which by mistake or fraud he has received no compensation, or has been deprived of the benefit of his contract by the acre. See *Horn v. Denton*, 2 Sneed, 125.

The rule on this subject of abatement of the price in England in cases of failure of acreage is thus given in *Leading Cases in Equity*, Vol. 1, 71. Where the vendor having a title to an estate, misrepresents the acreage, whether the estate be sold at so much per acre or not, the purchaser will be entitled to compensation for a deficiency. This rule is especially held to apply to cases like the present where a conveyance has not been made. It seems from



the authorities cited in support of this view, that it is a matter of course to grant the relief in a court of equity in England, unless the deficiency be trifling. *Ibid.*

With these principles settled, we think the proof in this case shows, by a decided preponderance, that the sale was by the acre, and that Porter certainly represented the island to contain the 214 acres, less tide washes. Even the testimony of Howrie, whose opinion was that it was a sale in gross, corroborates this view, for he says that Porter objected to guaranteeing the quantity of land in the island tract, subject as it was to be washed away by river currents. Therefore, the stipulation that loss from this influence was excepted in the title bond. The proof, however, shows that there has been no loss from this source, but on the contrary, a probable addition to the soil of the island.

We need not give details of the testimony on this question, suffice it to say that it is clearly shown by several witnesses that Porter stated he had sold the land at \$12.50, and said that if there was the deficiency complained of he must make it good; no doubt he would have done so had he lived. The fact that his own deed called for 214 acres and that the notes are taken for the precise sum, including the cash payment that results from multiplying 1,114 acres by \$12.50, the assumed price, all serve to lead to the same conclusion as asserted by the testimony to which we refer.

With this view of the case we do not deem it necessary to discuss other questions referred to by counsel, as they would not change the result.

We therefore hold the complainants are entitled to an abatement for the 105 acres deficiency at the price agreed, \$12.50, reversing the decree of the Chancellor.

The costs of this and court below will be paid by defendants.

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## RICHARD FITZGERALD v. THE STATE OF TENNESSEE.

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Jackson, September Term, 1875.

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DYING DECLARATION.—WHEN INCOMPETENT.—BECAUSE NOT THE WHOLE CONVERSATION.—Witness heard a conversation between deceased and others about

the difficulty, but remembered only the "*substance of one expression.*" *Held*, error to allow him to detail the substance of one expression without giving the whole conversation.

When the deceased, in answer to question asked him by witness, made a statement, "and was about to say something more when witness stopped him." *Held*, under the circumstances, it was error to let the statement made go to the jury. The declaration was fragmentary and too incomplete to be received as evidence.

GENERAL CHARACTER OF DECEASED.—It is error to permit evidence to go to the jury as to the general character of the deceased for *piety*, and that he is a member of the church. It is not warranted under the rule admitting evidence of the character of deceased for *peaceableness*.

SELF-DEFENCE.—The court charged the jury, "if you find the defendant Richard, upon learning that the deceased, together with Vinson, was coming toward his mother's house, and that they were either armed or unarmed, and thereupon defendant armed himself with a deadly weapon and advanced towards the deceased as far as his mother's gate, and stationed himself there to await the coming of deceased with the view and intent of engaging in deadly combat with deceased, provided deceased should assault him with a deadly weapon; and thereupon the deceased advanced near the gate and either did or did not assault the defendant, and thereupon the defendant shot and killed the deceased, he is guilty of murder. *Held*, this charge calculated to mislead the jury.

The charge should have been "If the defendant advanced to the gate, determined or intending not to fight unless for his defence and protection, and a violent and dangerous assault was made upon him, which threatened him with death or great bodily harm without his seeking or provoking it, and he killed his adversary to prevent his own death or save him from great bodily harm, it would be killing in self-defence.—[Ed.

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H. E. JACKSON, SPECIAL JUDGE, DELIVERED THE OPINION OF THE COURT.

The plaintiff in error and Quitman Fitzgerald, were jointly indicted at the September term, 1874, of the Circuit Court of Henry county, for the murder of J. J. Jordan. At the same term of said court on the application of defendants, the venue was changed to Weakley county, and at the October term, 1874, of the Circuit Court of Weakley county, they were tried.

Quitman Fitzgerald being acquitted, and the plaintiff in error found guilty and convicted of murder in the second degree, and his term of imprisonment fixed at fifteen years.

His motion for a new trial and in arrest of judgment having been overruled, he appealed to this court, and by his counsel has assigned various errors as grounds of reversal.

Amongst others, it is insisted for the prisoner, that the court below erred in admitting the evidence of Dr. Porter, as to a certain declaration made by Jordan after he was shot. Dr. Porter, after stating that Jordan said he would die, "stated that he heard a conversation with Jordan and others about the difficulty, and that he remembered but one expression of Jordan's; that he remembered "*the substance of that one expression.*" The prisoner objected to the witness stating the substance of that one expression without giving the *whole conversation*; the court overruled the objection, and the witness then stated that Jordan

said, "he didn't expect any difficulty." In this we think the court erred. The expression, too, was only part of what Jordan said; the balance of the conversation in which the expression was used may have explained or qualified it. The substance of no one portion of the conversation, without giving the whole, would have been admissible even in a civil suit.

Again, D. Landis was allowed, over the objection of the prisoner, to state what Jordan said to him under the following circumstances. After stating that Jordan thought he would die, witness said: "I asked him what he went up to Fitzgerald's and raised a difficulty and got shot for; he said he didn't know what Dick, (plaintiff in error), shot him for, and was about to say something more when I stopped him." It is manifest from this statement, that the deceased had not, when *stopped*, completed all that he intended saying in response to the question asked him by the witness.

This declaration of the deceased under such circumstances must be considered fragmentary, and too incomplete to be received as evidence, under the rule laid down by the authorities, 1 Greenleaf's, 159, and Wharton's Am. Criminal Law, section 674, etc., and in permitting it to go to the jury we think the court below erred. The objection to the dying declaration of the deceased as testified to by Josiah Davis, we consider well taken. That statement of the deceased was complete in itself, and there was nothing to show that any further or any other statement was either made or intended to be made by him, but it was not such a dying declaration as admissible under the rules of evidence.

The statement that "he (the prisoner) *was an innocent man; that he went there with no evil intentions*," tends in no way to identify the prisoner or connect him with the difficulty; nor does it constitute a part of the *res gestæ* of the shooting. His intentions may not have been evil, and yet his acts may have a contrary impression in the mind of the prisoner. He may himself have had no evil intentions, while those accompanying him may have had.

The first clause of the sentence, that "*he was an innocent man*," was not a question or matter of fact, for him to determine, and would be carrying the rule as to dying declarations too far to admit statements of this character.

Again, the court, over the objection of the prisoner, permitted evidence to go to the jury as to the general character of the deceased for piety, and that he was a member of the church. This could hardly be warrantable under the rule admitting evidence

of the character of the deceased for peaceableness, and in admitting such evidence the Circuit Court erred.

The material evidence in the case is in many respects very conflicting, and in view of the respective positions of the parties at the time of the difficulty, and of the conflicting character of the evidence for the State and for the prisoner, as to what occurred at the house of Emily Bronson on the preceding Thursday evening, and on the morning of the shooting.

We are not satisfied with the correctness of the judge's instruction to the jury upon the law of self-defence. The record discloses that there had been at the house of Emily Bronson on the Thursday evening before the shooting, an interview between the deceased and the two Vinson's on the one side and the prisoner on the other, which was angry and denunciatory on the part of the former; and that there was also proof tending to show that the prisoner, when he saw the same parties approaching his house on the following Saturday morning, expected or supposed that they were coming to attack or assault him; that having armed himself with a shotgun and stationed himself at the gate, where he remained until the deceased and one of the Vinson's came within speaking distance, when the prisoner ordered them to halt, but as to the number of times they were halted and the other facts connected with the shooting; the evidence for the State and the prisoner is so entirely conflicting, that we do not deem it proper to comment on it or express any opinion as to its relative weight.

The circuit judge, after stating the general doctrine of the law of self-defence, proceeded to charge the jury as follows, viz.: "Further, to justify the killing upon the ground of self-defence, it must appear that the defendant had no means of escaping from the *assault* of the deceased, and that is if he could have escaped without endangering the safety of his person. If the deceased assaulted the defendant with such violence, and in such a manner as to endanger the personal safety of the defendant by attempting to escape, then he might well slay his adversary—provided he had not by his own wrongful acts, brought the danger upon himself, as before defined to you."

The proviso to this instruction, as well as the *qualifications* annexed to the first part of the charge on self-defence, viz.: "unless the proof shows that the danger of or to the defendant by which he was surrounded was brought on by his own wrongful acts," seem to mean, or at least leave it to the jury to infer, that the defendant's *act* in going to the gate with his gun was in and of itself so wrongful, (without regard to his intention in so do-

ing) as to deprive him of the right to defend himself and repel a deadly assault.

The court further charged the jury, that "if you find the defendant, Richard, upon learning that the deceased, together with Vinson, was coming towards his mother's house, and that they were either armed or unarmed; and thereupon defendant armed himself with a deadly weapon, and advanced towards the deceased as far as his mother's gate, and stationed himself there to await the coming of deceased, with the view and intent of engaging in deadly combat with deceased, provided the deceased should assault him with a deadly weapon; and thereupon the deceased advanced near the gate and either did or did not assault the defendant, and thereupon the defendant shot and killed the deceased, he is guilty of murder."

This instruction ignores the fact that the defendant was upon his own premises, and in effect deprives him of the right to make preparation for his defence against an expected *deadly* personal assault, and to select upon what portion of his premises he will receive and repel *such* assault. The law certainly did not require him to retire from any part of the curtilage. If the defendant went to the gate with the purpose and intent of seeking and provoking a deadly contest, and he did provoke it and killed the deceased in such conflict, then he would certainly be guilty of murder. The object, purpose and intent with which he advanced to the gate was an important question of fact. But under the above instruction, although he had gone to the gate with the most pacific and lawful purpose, but yet resolved to defend himself if assaulted, or only resort to force to repel force, he would nevertheless be guilty of murder if he killed deceased in resisting a deadly personal assault. We cannot assent to this view of the law as applicable to the facts and circumstances of this case. We are of opinion that the proper instruction to have given on this *branch* of the charge was this: that if the defendant advanced to the gate, determined or intending not to fight unless for his defence and protection, and a violent and dangerous assault was made upon him, which threatened him with death or great bodily harm without his seeking or provoking it, and he killed his adversary to prevent his own death or save himself from great bodily harm, it would be a killing in self-defence. This was in substance, the charge of the circuit judge in the case of *Copeland v. The State*, 7 Humph. 479.

The first instruction asked for by defendant covered this proposition, and should have been given with the modification that the assault which threatened him with death or great bodily harm,

originated "without his seeking or provoking it." We have not noticed the other errors assigned and insisted upon in argument, as we deem them not well taken.

The judgment of the Circuit Court will be reversed and a new trial granted.

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**WILLIE SCROGGINS v. ALEXANDER BARNES, et al.**

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**Jackson, December 9, 1876.**

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**ILLEGITIMACY.—DESCENT.**—When an illegitimate woman dies seized of real estate, leaving no child, mother, or brother, but leaving a husband and illegitimate sister. *Held*, that the sister is not entitled to the estate as against the husband.—[ED.]

**CASES CITED.**—Webb v. Webb, 3 Head, 69; 1 Cold., 563; Code, Sec. 2423, 2423 a.

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**DEADERICK, CH. J., DELIVERED THE OPINION OF THE COURT.**

The bill and amended bill show that complainant, a colored woman, and Harriet are sisters, both being illegitimate and born of the same mother.

Complainant alleges that her sister first married one Penny, and after his death married Walker, and died in August, 1869, leaving her husband surviving, but leaving no child, and no mother, nor brother, nor sister except herself; and she files this bill to recover certain real estate which said Harriet owned at the time of her death, situated in the city of Memphis.

The defendants demurred to the bill, the demurrer was sustained and the bill dismissed, and complainant has appealed to this court.

The question presented upon the demurrer is, whether complainant, as sister of said Harriet, is entitled to the estate left by her, she having died leaving her husband surviving.

And we are of opinion she is not.

The case of Webb v. Webb, 3 Head, 69, was one of the death of an illegitimate in June, 1858, leaving no child but a widow and a mother and legitimate brothers. It was held that the rule governing the case was found in Code, section 2423, and after quoting the section, the court declares the course of descent to be under said section, first to the child or children of the illegiti-

mate, if any there be; if none, then to the surviving husband or wife; if there be no surviving husband or wife, then to the mother, and if no surviving mother, then to the brothers and sisters by the mother, or their descendants.

In this case there was no child surviving, but the bill states that there was a husband surviving, and claims that complainant is entitled to the estate before him, or in exclusion of him under section 2423 *a*, act of 1866-7.

That section provides, "where any *woman* shall die ntestate, having a natural born child or children, whether she also have a legitimate child or children, or otherwise, such natural born child or children shall take by the general rules of descent and distribution, equally with the other child or children, the estate real and personal of his, her and their mother; and should either of such children die intestate without child or children, his or her brothers and sisters shall in like manner take his or her estate."

It had been held in 1 Cold. 563, that the illegitimate, though born of the same mother, do not inherit equally with the legitimate, the estate of a deceased brother; and while a legitimate brother or sister could inherit from an illegitimate brother or sister born of the same mother, an illegitimate brother or sister, though born of the same mother, could not inherit from a legitimate brother or sister.

And for the purpose of enabling the children, legitimate and illegitimate born of the same mother, to take her estate equally, and also to enable them to inherit equally as between themselves, the act of 1866-7, section 2433 *a*, was passed. But it was not intended by said act to change the course of descent prescribed in section 2423.

The Chancellor's decree will be affirmed.

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JOHN ATWOOD v. BROWN & DILLON, AND CALDWELL  
& HAYS.

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Jackson, October 14, 1876.

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1. MORTGAGE.—DESCRIPTION OF PROPERTY IN.—SUFFICIENT.—WHEN.—A description which will enable third persons to identify the property is sufficient. The description in the deed was as follows: Seventeen head of horses, three

mules, eight wagons complete, six carts and horses complete, eighteen scrapers and attachments. *Held*, sufficient.

2. PAROL PROOF.—ADMISSABLE.—Parol evidence is admissible to identify the property, which the mortgage itself indicates.

3. PROVISIONS IN MORTGAGE FOR FUTURE ADVANCES.—Provisions in a mortgage for future advances, if free from fraud, is not objectionable.—[Ed.]

CASES CITED.—*Barker v. Wheeliss*, 5 Hum., 329; *Hilliard on Mortgages*, Vol. 2, 374, *et seq.*; *Burrell on Assignment*, 262; *Deery v. McGavock*, 1 Cold., 265.

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M<sup>r</sup> FARLAND, J., DELIVERED THE OPINION OF THE COURT.

This is an attachment bill, in which the complainant charges that the defendants, Brown & Dillon, are justly indebted to him in an amount stated, and that they are absconding and removing their property from the county privately, etc., upon which grounds an attachment against their property is prayed for. The bill further charges "that Geo. E. Glass as trustee, holds a mortgage or deed of trust on seventeen horses, three mules, eight wagons, carts, shovels, scrapers, spades and tools of various kinds, executed by Brown & Dillon to secure L. M. Caldwell and J. W. Hays for supplies, not to exceed \$2,000, which was registered the 8th May, 1873. \* \* \* He charges that said deed of trust is fraudulent and void in law and fact on its face; and he charges that the debts it was intended to secure have been paid, and that it is void for insufficiency and uncertainty." The bill then further charges in substance, that in any event it will not require all of said property to pay the debts secured by the deed of trust. He prays that the property be attached and the deed of trust set aside, or if not entitled to this relief, that he have the surplus after satisfying the trust debts. An attachment issued, specially directing the attachment of the trust property. The return of the sheriff shows that he attached property answering the general description of the trust property, and other property besides not designated in the deed of trust. There was judgment *pro confesso* against Brown & Dillon, but Caldwell & Hays, and the trustee, Glass, answered, denying the fraud and showing the amount of the trust debt due. The cause was heard upon the bill, judgment *pro confesso* against Brown & Dillon, the answer of Caldwell & Hays, and Glass, and the deed of trust without other evidence.

The Chancellor decreed that the deed of trust was valid, and that Caldwell & Hays were entitled to priority over all other creditors, "in the fund realized from the sale under said deed of trust by George E. Glass, trustee."

The cause was referred to the clerk to report, "the amount of



money realized by Geo. E. Glass, trustee, from sale of property by him under said deed of trust."

2. The amount of the indebtedness of Brown & Dillon to Caldwell & Hays.

3. The amount of the indebtedness of Brown & Dillon to John Atwood, the complainant.

4. The cash expenses of the trust.

From this decree the complainant has appealed.

The argument for reversal has been principally upon the ground that the deed of trust is void for uncertainty in the description of the property conveyed. The description in the deed is as follows: "Seventeen head of horses and three mules, eight wagons complete, six carts and harness complete, eighteen scrapers and attachments." There is nothing showing where the property was situated, or other reference going to identify it.

Our first inclination was to hold this deed void for want of a sufficient description to identify it from other articles of a similar character that the makers of the deed may have owned. For if the makers of the deed at the time owned more than seventeen horses and more than three mules, it would be impossible to tell from the general description, without more, which particular seventeen horses or three mules passed by the conveyance. But the authorities seem to establish a different conclusion and to allow parol testimony to aid the defective description. Very general descriptions have been held sufficient. In *Barker v. Wheeliss*, 5 Hum. 329, the description of the stock conveyed was "about twenty-five head of horses, six mules, one hundred and fifty head of sheep, forty head of cattle, including oxen and two hundred head of hogs." Four of the horses claimed to have been conveyed in this deed having been converted by the defendant, an action of trover was brought and proof was offered on the trial to show that the maker of the deed had at the time but seventeen horses, and that the four in dispute were part of them. The circuit judge rejected the testimony, but this court reversed his ruling, Judge Turley saying, "the design obviously was to convey all the horses he had, and parol proof must always become necessary in such cases and to refuse it must invariably defeat sales of personal property of this kind when it is not delivered at the time of the sale, as it will be found impracticable to give such description of it as to obviate the necessity of introducing parol proof to show that the property sued for is the same thus conveyed."

The difficulty that would arise in a case where the deed conveys a number of horses without describing them so as to iden-

tify them from his other horses, might also arise, even though they be described by their color or such other description as they are susceptible of, for it might even then happen that the bargainor owned other horses of like description, and parol proof would be necessary in either case.

The authorities as quoted in Hilliard on Mortgages, Vol. 2, p. 374, *et seq.*, and Burrell on Assignments, p. 262, show that the tendency of the decisions has been to uphold such conveyances.

It is said "any description which will enable third persons to identify the property, aided by inquiries which the mortgage itself indicates, will be sufficient."

In one case it was held that a mortgage of a specific number of articles of a particular kind in a house in which are other like articles of the mortgagor, gives to the mortgagee the right of selection."

In another case it was held that if a mortgagor had a less number of articles than the number conveyed, that the conveyance would pass all he had; if he had a greater number then it would be void for uncertainty.

In the present case there is no issue of fact as to whether Brown & Dillon owned at the time other property of the description conveyed; whether he had more than seventeen horses or three mules, or more than the number of other articles conveyed. The return of the officer on the attachment is no evidence of what property was owned by said parties *at the date of the deed of trust*," nor is it averred that the property in controversy was not, in fact, the property conveyed. There is no proof on the subject. We infer from the decree that there has been a sale by the trustee. The decree of the Chancellor is in general terms that the deed of trust gave to Caldwell & Hays a lien on the fund realized by Glass from a sale of the property under the deed, whether he has sold the same or different property has not been shown. There is at least no error on the face of the decree, unless we hold as argued, that the deed is void on its face. But we hold that it is not. While it may be looked to as evidence of fraud, yet parol proof may be heard to show that the property in controversy was the property conveyed as in the case of *Barker v. Wheeliss*.

We think there is no fraud in this deed, and the provision for future advances was not objectionable, if free from fraud. See *Deery v. McGavock*, 1 Cold. 265.

Affirm the decree with costs and remand the cause to be proceeded with.

THE STATE *v.* L. B. WILLIAMS.

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Jackson, October 28, 1876.

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CHANCERY JURISDICTION.—FRAUDULENT CONVEYANCE.—EXISTING JUDGMENT.—DISCHARGE IN BANKRUPTCY.—1. The provisions of the Bankrupt Act, which vest in the assignee, for the benefit of creditors, all the property and rights of the bankrupt, including property previously conveyed in fraud of creditors, mean only by the latter the right to sue for and recover property thus fraudulently conveyed; and the title to such property does not absolutely pass to the assignee until suit is successfully prosecuted for the purpose of setting aside the conveyance. This right is given the assignee for the benefit of those creditors only who prove their claims and acquire a right to a distribution, but such right is not given the assignee exclusive of all others unless he assert his claim.

2. Hence, where the assignee has not sued for and recovered the property, a creditor whose debt is not discharged and who had a valid judgment existing at the date of the discharge in bankruptcy, may maintain a bill to set aside a fraudulent conveyance executed by the bankrupt.

3. The facts being conceded, the conveyance being void as to the complainant, and the property itself being the subject of the litigation, neither the bankrupt nor the fraudulent vendee can complain, as the property is gone from the former, and cannot be a second time recovered from the latter.

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M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

The State obtained judgment against T. W. Byrd and others, on the 17th of May, 1873, in the Circuit Court of Hardin county, for upwards of \$8,000, said Byrd and others being the sureties of E. J. McGee, revenue collector for the years 1866 and 1867 for said county, the judgment being for the balance of revenue due the State. An execution was issued on this judgment and was returned *nulla bona*. The present bill was filed the 3d March, 1876, for the purpose, among other things, of setting aside a conveyance of certain lands alleged to have been made by said Byrd to his son-in-law, W. D. Read, on the 29th October, 1869, it being charged in the bill that said conveyance was made for the purpose of hindering and delaying creditors. In addition to the above allegations, the bill further charges, that the suit in which the State recovered the aforesaid judgment was commenced on the 29th day of June, 1870, and that said defendant, Byrd, appeared and pleaded to the action; while this action was pending on the 22d December, 1871, said Byrd filed his petition in bankruptcy in the U. S. Court; on the 8th of January, 1872, he was adjudged a bankrupt, and on the 15th of April thereafter was duly discharged. That in his schedule of assets he reported no real estate, and nothing in fact but a few articles of personal property, which were allowed him as exemption. The only liability reported of any consequence, was the aforesaid liability to the State. As before stated, after this discharge was

obtained, on the 17th May, 1873, the cause of the State was tried and judgment rendered as before stated.

A demurrer filed by Byrd and Read was sustained, upon the ground that the Chancery Court had no jurisdiction to grant the relief prayed for, the facts stated in relation to the bankrupt proceedings forming an insuperable obstacle.

We think this precise question has not been decided by this Court. We have several times held that the State courts have no jurisdiction to set aside a discharge granted by the U. S. Court in bankrupt proceedings, upon the ground that the discharge was obtained by fraud.

The court has also held, that pending a bankrupt proceeding a creditor cannot disregard such proceeding and proceed in the State court to collect his debt by setting aside a fraudulent conveyance. That he must seek his remedy in the bankrupt court. *Alsabrooks v. Cates, et al.* 5 Heisk.

In the case of *Hautrik et al. v. Bragg, et al.*, MSS., the complainants had a bill pending to reach certain properties of the debtors, to satisfy their debt, and for this purpose to set aside a decree of court which it was alleged was obtained by fraud, and by which the title to the debtor's property was vested in his children. Pending this bill the debtor filed his petition in bankruptcy; the complainants appeared, proved their claim and resisted the discharge, upon the ground of this fraudulent disposition of the debtor's property; but the question was decided against them by the bankrupt court, and this court held that they were thereby concluded and could not afterwards successfully prosecute their cause in the State court.

This holding was manifestly inevitable, upon the ground that the question was *res adjudicata*, and because the complainants were no longer creditors, their debts being discharged by the bankrupt proceeding.

But in the present case it is manifest that the State has a valid judgment against the defendant, Byrd, which is not affected by the bankrupt proceedings so far as the right is concerned to collect the same out of any property or rights the said defendant now has or may acquire, subject to execution or legal process, although the claim was in existence at the date of the bankrupt proceedings; yet as the judgment is of a date more than a year subsequent to the defendant's discharge, we must take it that the defendant waived his discharge by failing to plead it, or that the court determined that the liability was one of that class not discharged by the bankrupt proceeding. The judgment is beyond doubt valid; and being founded upon a claim in exist-

ence at the commencement of the bankrupt proceedings, it must be held to stand upon the footing of a debt not dischargeable in bankruptcy.

How then can the complainant proceed to the collection of this judgment? Leaving out of view the bankrupt proceedings and taking the bill as true, the case is clear, the conveyance being in fraud of complainant's claim then in existence.

Do the bankrupt proceedings form an insuperable obstacle? By the provisions of the bankrupt act, the property and rights of the bankrupt pass to and vest in the assignee for the benefit of creditors, and this includes property previously conveyed in fraud of creditors; but this latter must mean only the right to sue for and recover property thus fraudulently conveyed; by such conveyance the title to the property passes to the fraudulent vendee, where it remains until set aside at the suit of creditors, or the assignee suing for the benefit of creditors, so that the title to the property does not absolutely pass to the assignee until a suit successfully prosecuted for the purpose of setting aside the conveyance.

The assignee then has the right to sue for and recover the property thus fraudulently conveyed for the benefit of all creditors who prove their claims. It is perhaps very clear that a creditor who has thus proved his debt and who thus acquires a right to share in the distribution, must prosecute his right to reach the bankrupt's assets through the assignee. His right is to share with the other creditors in the distribution of the bankrupt's assets, and for this purpose it is the duty of the assignee to sue for and recover all property and assets in his reach; but beyond this, a creditor standing in this attitude cannot go; his debt against the bankrupt is discharged, leaving him only the right to procure through the assignee his *pro rata* of all the assets. So that a creditor, standing in this attitude when he attempts to disregard the bankrupt proceedings and institute an independent proceeding, is met at once with the objection that he has no claim upon which to proceed against the bankrupt, his debt is discharged, and he cannot withdraw assets from the jurisdiction of the bankrupt court and appropriate them exclusively to his own debt. But a creditor who has obtained a valid judgment subsequent to the bankrupt's discharge upon a pre-existing claim, does not stand in this attitude. He has a valid footing upon which to proceed against any property rightfully subject to his debt. He might have sought his share of the assets in bankruptcy, in which event he would have to seek his right through the assignee; but after having received his share he is not like

other creditors, at the end of his row; he still has a valid judgment not discharged, and to have satisfaction of this judgment he may still proceed against property which by law is liable. Why shall he not proceed against the property conveyed in fraud of creditors? The answer is, that this property or right is given to the assignee for the benefit of those creditors who proved their claims and acquired a right to a distribution. But is this right given to assignees exclusive of all others? We may concede that if the assignee assert his claim that it would be superior to the right now asserted by complainant, but it is not exclusive. Suppose the assignee had sued for and recovered the property now in controversy, and out of the proceeds paid all the debts proven, leaving a surplus, as according to the facts in the bill alleged would have been the result, might not the complainant have reached this surplus; if not where would the surplus go? We think the complainant might reach it. How? Not through the assignee, for the claim was not proven in the bankrupt court and no right of participation acquired.

But the assignee has not sued for and recovered the property, as often happens, not being willing to risk the costs of a suit, the claim was not prosecuted; shall a creditor whose debt is not discharged, and who has a valid judgment lose his right, which as we have said is an independent right?

The bankrupt cannot object to the recovery sought in the present bill; the judgment against him is valid. The property is gone from him in any event. How is it with the fraudulent vendee, how can he complain? The facts conceded, the conveyance is void as to creditors, and the complainant is a creditor; but says the fraudulent vendee, the assignee in bankruptcy has the better right to recover this property. Suppose he has, he has never asserted the right. But suppose he may yet do so? Is this any objection to the complainant's right to do so? In short, the complainant is a creditor, and upon the facts stated, this conveyance as to him is void.

If the assignee should hereafter set up his claim, it might be only to recover the property or its proceeds, from the complainant. The fraudulent vendee is in no danger of suffering two recoveries, as the property itself is the subject of the litigation, and when once recovered from him cannot be recovered again. The bankrupt proceedings being at least for the present at an end, it cannot be said that the property in controversy is in the custody or control of the bankrupt court. The court of one government cannot interfere with property in the actual control or jurisdiction of the other. Besides, we think under the bankrupt act, the time in

which the assignee may sue for this property has expired, but even if this be not so, the bill can be maintained.

The decree will be reversed, the demurrer overruled and the cause remanded, the defendant paying the costs of this court.

Freeman J., concurs upon the ground that the assignee's right to sue is barred by the bankrupt act.

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S. MOSES, *Administrator, etc.*, v. MARCRIEF.

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Jackson, December 9, 1876.

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1. ATTORNEY.—AUTHORITY OF.—HIS DUTY TO CLIENT.—An attorney is not authorized to receive anything but money for his client; and any agreement he may make with his defendant otherwise, is a breach of duty, and not binding on his client.

2. SERVICES OF WIFE.—NOT BASIS OF CONSIDERATION.—A husband being entitled to the services of his wife, it is no basis for consideration upon which to support a contract, and all remuneration for such services by the husband, must be considered as a gift, and void as to creditors unless registered according to law.

3. VOLUNTARY CONVEYANCE TO WIFE.—VOID.—WHEN.—A voluntary conveyance to a wife is *prima facie* void as to creditors existent at the time, unless it be shown that ample means for the payment of such debt was retained by the husband.—[Ed.]

CASES CITED.—Dillard v. Dillard, 3 Hum. 41; 4 Sneed 124; 9 Hum. 565.

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FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

This bill is filed to subject a tract of land conveyed to the wife of Marcrief to the payment of a judgment obtained by complainant against her husband. The judgment was had September 30th, 1867; the deed was made 29th January, 1868.

Only two questions are now before us on the appeal as presented in the record.

First, as to whether the judgment had been paid. Second, as to whether the conveyance is void as to creditors of the husband, as being fraudulent in law if not in fact.

As to the first question, there is no payment shown which can bind the complainant. John Hallum was the attorney who obtained the judgment and filed this bill. He owed other parties, represented by one Only as attorney. Only was the attorney of defendant in this case; Only was furnished the money to pay

this debt by defendant. He agreed to a settlement with Hallum, by which the judgment was to be satisfied and this bill dismissed, each party paying half the costs.

That agreement was, however, that Hallum was to pay the debt he owed Only for parties represented by him, by allowing Only to retain the money of defendant; thus receiving payment of complainant's debt by paying his own debt, and he becoming paymaster to his client.

We need but say, that the attorney, Hallum, was not authorized to make this arrangement or to receive anything but money for his client. It was a breach of his duty to make such an agreement, and not binding on his client. Only was equally guilty, perhaps, of breach of his duty in receiving or retaining the money of his client in payment of claims on Hallum, and would probably be responsible to Marcief for the money so obtained.

As to the second question. The facts are found mainly in the answer of Mrs. Mancief, for its solution. It is claimed by her that her husband, some time previous to the conveyance, had been jailor of Shelby county. That she did service claimed to have been beyond the usual duties of a wife, in cooking for the prisoners under charge of the husband. That in consideration of these services the husband promised, out of the proceeds of their joint labor, to buy a homestead to be settled on her as her separate estate, for her use and for her family. That as the warrants from the State and county were received they were sold to the amount of about \$1800, and these proceeds given to her for the above purpose, while it is said he had no creditors to complain of it. Afterwards, this money or part of it was invested in a note, and balance loaned out. These notes, the one bought and the one for loaned money, are claimed to have been invested in the land in controversy.

On these facts, is complainant entitled to subject the land to payment of his debt. As to the assumed gift of proceeds of warrants, this must be held to amount to nothing. It was void as to creditors for want of registration. Section 1760 of the Code, declaring all conveyances of goods and chattels not made on valuable consideration, "shall be taken as fraudulent, unless the same be by will duly proved and recorded, unless possession remain with the donee," that is, void as to creditors of the donor. *Dillard v. Dillard*, 3 Hum. 41.

This assumed transfer is not supported by valuable consideration, but must be treated as a pure agreement for a gift not perfected by delivery, the services of the wife being but what the hus-



band was entitled to, therefore no basis for consideration to support a contract. In fact, it is substantially treated as a gift in the answer, as it certainly was.

This being so, the only question is, as to whether the voluntary gift is good as against creditors under the fact stated. It must be treated as assuming legal form for validity only at date of conveyance. The judgment was obtained on 30th of September, 1867, the deed made 29th January, 1868. We need but state without argument, the long settled rule in this State, that a voluntary conveyance is *prima facie*, void as to creditors existent at the time. To rebut this presumption, it must be shown that ample means for the payment of existent debts were retained by the husband independent of the provision made for the wife. 4 Sneed, 124; 9 Hum. 565.

There is no evidence in this case to rebut this presumption; nothing to show that any property whatever was retained to meet existing liabilities. On the contrary, the sheriff *nulla bona* on the execution issued before the filing of this bill would be *prima facie* evidence against the existence of such facts.

As to the argument based on the idea that the money in this case was originally derived from official salary could not have been subjected to execution, attachment or garnishment, we need but say, the principle has no application to this case. This is not an application by any one of these modes to subject such salary to debt. It has gone into the hands of the husband, been collected by him and stands as any other property or fund in his hands, governed by the same rules.

On the whole case, we reverse the decree of the Chancellor and hold the land subject to payment of the debt of complainant. It will be sold by the clerk of this court, if debt is not paid in ninety days from adjournment. But as there is no prayer for sale without redemption it must be sold on usual terms of cash, subject to redemption. Costs to be paid out of proceeds of sale.

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### THE STATE v. BROWN.

Jackson, November, 1876.

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LARCENY, A DOG THE SUBJECT OF.—Under the statute of interpretation, section 51, Code of Tennessee, a dog is personal property, and therefore, if of any value, is the subject of larceny.—*Editor Law and Equity Reporter.*

SNEED, J., DELIVERED THE OPINION OF THE COURT.

The defendant was indicted in the Criminal Court of Shelby county, for stealing a dog of the value of ten dollars. The court being of opinion that the dog is not the subject of larceny, on motion, quashed the indictment, and the State appealed.

*Abstract of Opinion.*—This ruling was but a reiteration of the immemorial doctrine of the common law upon this subject. 4 Bl. Com., 190; Hale's P. C., 512; 1 Bish. Cr. L., section 787; 7 Coke, 18a.; Findlay v. Beer, 8 S. & R., 571; 4 B., 236; 12 H., 8-3; 18 H., 8-2. And such must be accepted as the law at this day, unless it has been abrogated by statute.

The definition of larceny at common law and under our statute is the same: "The felonious taking and carrying away the personal goods of another," 4 Bl., section 230, Code Tenn., 4677. The old doctrine of the common law was abrogated by the statute, 10 Geo. III., ch. 18, which made the stealing of dogs punishable. While the old doctrine prevailed, the common law furnished the general examples of such goods, chattels, or property as constituted the subject of larceny, and from this category the animal in question was excluded. It would seem difficult to give a sound reason for the old doctrine, in view of the concession that the dog is property, and of the indisputable fact that they are sometimes esteemed of great value.

But, as we have said, the ancient law still prevails here, unless the statute has changed it. The terms, personal goods and personal property, are convertible, and in their general sense mean the same thing. The words "personal property" by our statute of interpretation mean "goods and chattels." The dog is personal property, and, if of any value, is under our statute the subject of larceny.

The Supreme Court of Alabama, in *Ward v. The State*, 48 Ala., 161, has decided that the dog is not the subject of larceny, but we suppose they had no statutory definition of "personal goods" or "personal property."

In the case of the *People v. Campbell*, 4 Parker's N. Y. Cr. Rep., 386, it was held that a dog, though property, to enable the owner to maintain an action of trespass for an unlawful taking, was not the subject of larceny at the common law, but under the provisions of the statute declaring all personal property the subject of larceny, an indictment for stealing a dog may be sustained.

The solution of the question in this State also depends upon the statutory definition of "personal property" and "personal goods" as used in our Criminal Code. A dog, if he have an owner, is personal property, and, if of any value, is the subject of larceny.

Reverse the judgment and remand the cause for trial.

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Deaderick, Freeman and Turney JJ., concurred; McFarland, J., dissented.

## General Legal Information.

### BOOK NOTICES.

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VOL. I. NASHVILLE, TENN., JULY, 1877. No. 3.

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THE STATE, *ex rel.*, P. C. BETHEL *v.* THE CITY OF  
MEMPHIS, AND THE GENERAL COUNCIL OF SAID  
CITY.

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Jackson, December 9, 1876.

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**MANDAMUS.—CONTEMPT.**—While implicit obedience to a writ of mandamus is required and no evasion is allowed, a strict and literal compliance is not required. As where a change has been made in the law requiring the performance of the particular act which has been commanded by mandamus, and the officers to whom the writ is directed, acting in good faith according to his best judgment as to the effect of such change in his legal liability refuses further obedience he shall not be punished for contempt, although mistaken in his judgment; and where a party refusing to obey shows that he is willing to comply with the mandate of the court he will not be punished; but will still be compelled to do the act required by the writ. An alias mandamus is the proper remedy to compel obedience where the first order has not fully been complied with.

**CASES CITED.**—Extraordinary Legal Remedies 548; High on Ex. Rem., Sec. 556.

M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

This is a motion to strike out the return of the defendants to a peremptory writ of mandamus issued from this court, and to attack the City Council for contempt in disobeying the process. Strictly speaking, there can be no such as a return to the peremptory writ of mandamus; from its very nature it requires implicit obedience, and only a certificate of obedience and of what has been done in its execution are allowed. High on Extraordinary Legal Remedies, section 548. The process must be obeyed; if disobeyed, further steps may be taken to compel obedience, and besides, the parties disobeying, may be punished for contempt.

The peremptory writ in this case commanded the City Council of Memphis to assess, and levy and provide for the collection of a special tax in addition to all other taxes allowed by law to be collected for the year 1875, upon all taxable property in the city of Memphis in the lawful money of the United States, sufficient in amount, after making due allowances for errors and insolvencies, to pay the relative debt, principal, interest and costs, and as fast as collected to pay the same over to the relator or his attorney.

The City Council say they have obeyed the mandate. They exhibit a copy of an ordinance passed the 27th December, 1875, entitled "an ordinance levying sundry mandamus tax," which ordains that a special tax of fifty cents on the \$100 worth of taxable property, be levied for the purpose of paying to the persons named in the within lists, the amounts set opposite their names upon presentation of the claims upon which their mandamus proceedings were based, the money to be paid over as fast as collected; when collections are not sufficient to pay all a *pro rata* to be paid to each. Then follows a list of persons having claims with the amounts of their claims, among which is the relator.

In explanation it is said mandamus proceedings had been had in all these cases, some from this and some from other courts. And instead of levying a separate special tax to pay the claim, the Council undertook to comply with the several mandates by levying one special tax sufficient to pay them all; it is shown the amount of this assessment upon the taxable property in the city would be sufficient, aside from errors and insolvencies.

The defendants further certify that part of this tax they have caused to be collected and paid over, the relator, Bethel, receiving \$1,232, or 28 per cent. of his claim; other of the parties named had been paid in full. The manner in which some were

paid in full was that by an act passed the 23d March, 1875, a part of the city charter, it is provided that all taxes falling due after the 1st of January, 1875, shall be payable in current funds or in past due indebtedness of the city for the current year, in kind or such as the tax for which it is received might be applied after collection." In accordance with this they passed an ordinance, which in substance authorized the collector to receive in payment of this special tax any of the claims it was levied to pay, and by assigning their claims or portions of them to the tax-payers, some of the parties named have received their debts in full while others received only 28 per cent., being their *pro rata* of the money actually collected. They say they have used all the means in their power to collect the money; that the realty upon which the tax was levied and remains unpaid has been duly reported and condemned to be sold, but no money was realized, it had to be bid in for the taxes; that they will proceed as fast as the remedies afforded by law will allow to collect and pay over the money. They further say that the tax-collector of the city, an independent officer elected by the people, has been advised that said tax was not laid upon merchants' capital, and has accordingly failed to collect the same; and defendants submit to the court whether said tax was properly leviable upon said merchants' capital, and aver their readiness at all times to perform the orders of the court.

The first question is whether the defendants have been guilty of contempt in refusing to obey the mandate of the court. While implicit obedience to the writ is required and no evasion is allowed, a strict and literal compliance is not required. As where a change has been made in the law requiring the performance of the particular act which has been commanded by mandamus, and the officers to whom the writ is directed, acting in good faith according to his best judgment as to the effect of such change in his legal liability, refuses further obedience, he shall not be punished for contempt, although mistaken in his judgment; and where a party refusing to obey, shows that he is willing to comply with the mandate of the court he will not be punished, but will still be compelled to do the act required by the writ. High on Ex. Rem., section 556.

It is argued that the City Council acted in contempt of the process of the court in not levying a special tax to pay the relator's debt separate from the others. We do not decide what their duty in this respect was; we think it manifest that they acted in good faith and according to their best judgment in making one levy to cover all the cases where they were ordered by madamus to levy a tax.

There is much to justify their course; a separate special tax in each case to be collected and kept separate from the others would have been in a great degree impracticable, considering the number of cases and the various amounts involved.

At any rate we see no reason for believing that the defendants in this acted in contempt of the process of the court, even if they were mistaken in their duty.

2. It is urged that they are in contempt for allowing part of the taxes to be paid in the claims and parts of claims which the taxes were levied to pay. They had for this the authority of the charter. The mandate of this court did not necessarily exclude the idea that this course might be taken.

The same advantage was given to all alike. By the order of this court the tax was to be collected in lawful money and paid over to the relator, but an order to allow the tax to be paid in the claim or claims could not injure anyone. It may have resulted in some of the parties realizing their debts before others by taking advantage of this provision, but all were at equal liberty to do so; at any rate, if it be conceded that this was wrong, we think at most it was but an error of judgment and not an act of contempt.

3. It is next insisted that defendants are in contempt for failing to collect the tax from the merchants' capital; that they are evidently in collusion with the tax-collector, and that they have the power to compel obedience from him.

The order of this court was to assess a tax upon all the taxable property of the city. The ordinance passed in obedience to this levies the tax of fifty cents "on the \$100 worth of taxable property," which we would understand to mean all the taxable property of the city, none being excepted. The statement of defendant shows the taxable property, including the merchants' capital and the estimate was made upon the whole. So we think the defendants have shown a compliance with the order in assessing the tax.

But it is said that even if the ordinance be in compliance with the mandate of the court, that the defendants have not done their duty in causing the tax to be collected; that although the tax collector is in some respects an independent officer, that he is still subject to the control of the City Council, and that they could compel obedience and should have compelled him to collect the tax from the merchants.

It has not been shown to us in what manner the defendants could do this; if there is any manner in which they can compel



obedience they express a willingness to obey the order of the court.

The motion to attack the defendants for contempt will be discharged.

As already intimated, the motion to strike out the return is not of practical importance.

An alias mandamus is the proper remedy to compel obedience where the first order has not been fully complied with.

We cannot, in this instance, award an alias to change the action of the City Council in making a joint assessment to meet the several mandamus cases against them instead of making separate assessments or to change their action in the other respect indicated, even conceding for the argument that the course adopted was improper. To attempt to change this now would introduce great confusion and be productive of no good.

If denied, an alias may issue commanding the defendants to proceed with the enforcement of the ordinance passed by them, and to use all means to collect off the merchants and all others the tax levied. We can, of course, decide nothing definitely as to the legality of the tax upon the merchants; we see no ground of objection so far as the record is concerned. It was certainly the duty of the tax collector to proceed to collect the tax from the merchants as well as others until he was stopped by some mode of legal resistance upon the part of the merchants.

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### MARY BILBREY *v.* J. I. POSTON.

Nashville, May 15, 1875.

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1. HOMESTEAD.—WHEN ALIENABLE.—Before the establishment of the Constitution on the 5th of May, 1870, there existed no Constitution or other legal inhibition to restrain the alienation of a homestead by husband, all transfers anterior to that date are valid.

2. CONSTITUTION WENT INTO EFFECT.—WHEN.—The Governor made proclamation on the 5th of May, 1870, declaring the result of the vote upon the ratification of the Constitution, which consequently went into effect upon and bears test from that date.

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DEADERICK, CH. J., DELIVERED THE OPINION OF THE COURT.

Complainant filed her bill in the Chancery Court of Overton county, Sept. 22, 1871, to set aside a deed made by her late husband, Herod Bilbrey, on 15th April, 1870.

The bill alleges that said Herod had departed this life since the execution of said deed, and that, she as his widow, was entitled to a homestead in the lands illegally conveyed by him; and that the conveyance was procured by fraud; and that said Herod was very old and of unsound mind, and incapable of doing a binding act at the date of the deed.

The statutes exempting homesteads, in favor of the heads of families from sale by execution or attachment, previous to the act of June 29, 1870, did not inhibit the voluntary alienation of such homestead by the owner thereof.

The act of 29th June, 1870, was passed pursuant to the provisions of the Constitution of the State, adopted in 1870. The 11th section of Article 11th of that instrument, exempts a homestead in the possession of the head of a family to the value of \$1000 during his life, and at his death to inure to the benefit of his widow and during the minority of the children occupying the same, and inhibits the husband's from alienating during his wife's life. The act of June 29, Code, section 2114 *a*, contains similar provisions and requires that the wife's consent shall be evidenced by conveyance, duly executed as required by law for married women.

The ordinance of the convention prescribing the manner and time at which the question of the ratification or rejection of the Constitution should be submitted to the vote of the people of the States, as well as the qualification of the voters, by its 4th section directs that the Governor, Speaker of the Senate and the President of the Convention or any two of them, shall compare the votes, and if it shall appear that a majority of the votes was cast for the new Constitution, then they or any two of them shall append to the new Constitution a certificate of the result of the votes, from which time the Constitution shall be established, and the Governor shall make proclamation of the result.

Accordingly, the certificate of the result was issued on the 5th May, 1870, and the Governor did on that day "declare and proclaim the result of the vote upon the ratification or rejection of the Constitution in pursuance of the fourth ordinance," as the proclamation recites, thus attesting that the Constitution was established on the 5th May, 1870.

The conveyance to defendant was executed 15th April, 1870, at a time when no constitutional or other legal inhibition existed to restrain the alienation of the homestead by the husband, he being the owner thereof.

The charges of fraud, and incapacity are wholly unsustained by the proof.

The vendor, although an aged and somewhat decrepid man, was in the possession of his ordinary and usual mental powers, understood the business he was about, and had around him at the consummation of the trade his family, including two grown sons, ready and competent to protect him against imposition.

We are therefore of opinion that the complainant is, on none of the grounds relied on in her bill, entitled to any relief.

The Chancellor so held and dismissed her bill, and we affirm his decree.

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JAMES M. MURRELL, *et al.* v. WATSON, *et al.*

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Nashville, March 3, 1877.

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1. EXPRESSED OPINIONS OF LAW.—NO ESTOPPEL.—WHEN.—If a party presents facts correctly in his bill, and expresses an erroneous opinion as to a conclusion of law upon the facts thus stated, he is not estopped thereby from having the correct judgment of the law upon the admitted facts.

2. VENDOR'S LIEN.—DOES NOT EXIST AGAINST INTERVENING EQUITIES.—WHEN.—When a purchaser of land conveys another tract to his vendor in payment of the purchase money, and title to the last conveyed property fails, the vendor having accepted this conveyance from his vendee in full payment, must look to the covenants of warranty in the last conveyance for his indemnity; and he cannot, when other equities have intervened, set up lien upon the property conveyed on account of failure of title to property transferred to him.

The principle is, that where a lien has been expressly retained to a specified extent, it is equivalent to a waiver of that lien to any greater extent.

CASES CITED.—Herm. Estoppel, 8-245; Sm. and Marsh., 465; 2 Vern., 281; 1 Paige, 32; 2 Leigh 353; 4 Wheat, 281.

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SNEED, J., DELIVERED THE OPINION OF THE COURT.

In 1857 the firm of Cheatham, Watson & Co, conveyed 5,010 acres of land in Cheatham county, to Samuel Watson, one of said firm, and to A. Anderson, Thomas J. Foster, E. S. Cheatham, Washington Barrow, C. W. Nance and Samuel Kimbro. All the purchase money was paid except that due from Barrow, and he paid upon his purchase \$1,047.55.

Each of the vendees took a separate conveyance of an undivided sixth part of the whole, except that Nance and Kimbro took jointly one-sixth interest in the property. The price for

which each purchaser gave his note, for the one-sixth interest thus purchased was \$4,166.66, making the aggregate sum of \$25,000, a lien being retained in each deed.

Samuel Kimbro, by a subsequent arrangement, was released as as a purchaser, and five of the six purchasers from Cheatham, Watson & Co., became owners each of two-elevenths of said land, and C. W. Nance of one-eleventh thereof. On the 31st March, 1860, these parties, who were carrying on the business of making barrels on said land under the name of the Oak Vale Barrel Company, sold this tract of land to Samuel Kimbro and C. W. Nance, including improvements thereon, and some personalty and material for their business at the price of \$40,000. The deed recites that \$10,000 of said \$40,000 has been paid by a lot of land on Maple street, South Nashville, this day conveyed to W. Barrow, trustee for the vendors, and the remaining \$30,000 were secured by the three notes of Samuel Kimbro and W. L. Nance, for 10,000 each, endorsed by complainant Isaac Paul, and Andrew Gregory. The deed further recites, "for the payment of which notes, *or any notes* substituted for them, a lien is retained upon the 5010 acres of land. It is also recited in this deed that Cheatham, Watson & Co. hold a lien upon the 5,010 acres, which is not impaired by this deed."

On the 2d day of April, 1869, two days after the conveyance of the 5010 acres to Kimbro and Nance, the latter executed his deed to Barrow, trustee for Watson and others, whereby he conveyed the Maple street lot, a lot on College street and a lot in Edgefield, recited in the deed to be for \$18,400 in hand, paid to me, W. L. Nance, being so much allowed me in payment for 5,010 acres of land in Cheatham county, Tennessee, purchased by me and Samuel Kimbro at the price of \$40,000. The deed then describes each lot and concludes, "altogether for the aforesaid consideration of \$18,400, *credits to me* in the purchase above stated of 5010 acres for \$40,000. The bargainor then covenants that he is seized of said land, have a good right to convey the same—and that it is unencumbered except the Edgefield lots—which he binds himself to remove. He then warrants the title against all persons whatsoever. At the time of the making of this deed by Nance, the three notes of \$10,000 each were surrendered and three notes of \$7,200 were given in their stead. These three notes and the lots conveyed at \$18,400 made \$40,000, the price of the Cheatham county land. The three \$10,000 notes were endorsed by Paul and Gregory. Nance executed a deed of trust upon said 5010 acres of land to indemnify his sureties upon said notes, two of which had been assigned and sued upon, and all have

been paid in full, and partly by his said sureties; and this bill is brought to sell the 5,010 acres of land to be applied to the satisfaction of debts which are a lien upon it according to their priority.

The main question presented is upon the claim by defendants to have \$3,500, the price of the Edgefield lots, declared a lien upon the 5,010 acres, superior to the claims of the sureties who are complainants, and who have paid part of the \$7,200 notes.

The Chancellor gave the preference to the vendors of Nance, upon the ground, it seems, that the bill which is taken for confessed against said vendors, states that "if the facts be as alleged, *complainants suppose* that the price of the Edgefield property would be a lien upon the 5010 acres.

The facts alleged and shown to be true, are that Nance did not pay for the Edgefield lots, and the vendors to him of said Edgefield lots filed their bill in the Chancery Court, and the lots were sold to pay the purchase money, and thus the title was lost. The Chancellor states that whether they were correct in their supposition, it is useless to inquire. They claim to bring the defendants into court with this concession made to them, and the latter are entitled to hold them to it as long as it remains a part of the proceedings." And he adds, "it would not be fair to the defendants, who have made no defence to the bill on the faith of this conception, to allow the complainants now to insist that they were mistaken in their inference."

We do not understand that a party presenting facts correctly in his bill, and expressing an erroneous opinion as to the conclusions of law upon the facts thus stated, is estopped thereby from having the correct judgment of the law upon the admitted facts. The existence or non-existence of a lien in this case was a question of law, and the opinion or concession of the complainant could not make it otherwise.

"A party is not estopped by his admission or assertion of a conclusion of laws upon undisputed facts." Herm. Estoppel, 8-245. We do not see how defendants are prejudiced by having failed to answer, or how they could have been benefited so far as the question under consideration is concerned, by answering. The facts were stated in the bill substantially, as they were shown by the evidence to exist. And the inference of the law from those facts was for the court to declare without reference to the opinions of the solicitor in the cause. Upon the facts stated and the prayer of the bill to subject the 5,010 acres to the payment of the debts which are liens upon it, and for general relief, we are of opinion that complainants may have such relief as the facts

stated warrants, and that they are not precluded because they may have supposed that they were entitled to it.

The question then recurs is the Oak Vale Barrel Company, or are the individuals composing that company entitled to a lien upon the land for the amount of the price at which they took the Edgefield lots in payment *pro tanto* for the 5,010 acres. It is as an absolute payment *pro tanto*, and trusted to Nance's covenants as security for that title, they could not as against those having intervening equities assert a lien for the price of said lots. By the terms of their conveyance they took the Maple street lot as a payment, and reserved upon the face of the deed a lien for the three notes of \$10,000 on each, or *any notes* substituted therefor. Within a day or two after they had executed their deed reciting the payment of the Maple street lot, and before the registration of their deed, they took a conveyance from Nance for the Maple street lot, a College street lot and the Edgefield lots, and for the aggregate price of \$18,400, and substituted three notes of \$7,200 each for three original notes of \$10,000 each and the lien as to these notes last taken, as substitutes for those first taken by the express terms of the conveyance attached. But it cannot be said that a lien was retained for the price of the Edgefield lot. The deed executed by Nance, which was accepted by the members of the company, recites that the \$18,400 was allowed *as a payment* on the 5,010 acres, and was credited on the purchase of the 5,010 acres, and the deed from Watson and others to Nance and Kimbro, shows that \$10,000 was paid on the 5,010 acres by a lot on Maple street, and three notes were executed for the balance of the \$10,000 notes, and that the lien retained was to secure these notes, or any other notes substituted for them. The language is explicit that the lien is retained to secure *notes* and not as indemnity for title to the lot, which was taken with covenants of warranty as absolute payment. The principle is that where a lien has been expressly retained to a specified extent, it is equivalent to a waiver of that lien to any greater extent. 1 Sm. and Marsh, 465; 2 Vern. 281; 1 Paige 31; 2 Leigh. 353; 4 Wheat, 281. And it was the understanding of the sureties that the lots were so taken and thus nearly half of the purchase money was paid, and a lien retained only for the remaining half. While Nance would be liable on his covenants for failure of title to the Edgefield lot, we are of opinion that no lien can be enforced as against complainants and to their prejudice for such failure of title, and to this extent the Chancellor's decree will be reversed. But as to the debt due Cheatham, Watson & Co., we think the Chancellor was correct in his conclusion,

and further, that such debt is due from and a lien only on Barrow's interest. But because the proper parties are not before the court, the cause will be remanded for new parties, and for the purpose of making such other and further orders as may be necessary.

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JOHN S. ODAM, *et al.*, v. RICHARD L. OWEN, *Adm'r.*  
of JAMES S. ODAM, *deceased*, AND PETER C. TALLY,  
*et al.*; AND PETER C. TALLY v. FISHER AND JETTON.

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1. PLEADING.—CROSS-BILL.—NEW PARTIES IN.—NOT ALLOWED.—A cross-bill may be based upon any proper matter of equity growing out of the original bill or connected with it, on which the respondent might be entitled to affirmative relief on a cross-bill, if filed separately; but the defendant to an original bill cannot introduce in his cross-bill new parties, they will not be liable to any decree on the original bill, nor could the complainant in this way be compelled by the defendant in the original bill to take such a decree, or be delayed in the prosecution of their rights by the interposition of these third persons into the litigation by the defendants.

2. GUARDIAN'S BONDS.—SURETIES ON.—LIABLE TO PRO RATA CONTRIBUTION.—Where a guardian has given bond and security as such, and is afterwards required to give an additional bond (having received other funds). *Held*, the sureties upon the first and second bond are liable to *pro rata* contribution.

CASES CITED.—Code, section 4323; *Dering v. East of Winchelsea*; *Craythorne v. Swinburne*, 14 Ves. in *Fell on Quantity*, 307.

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FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

The original bill in this case was filed by the minor heirs of of A. G. Odam, deceased, by their next friend, against the defendant, Richard L. Odam, administrator of James S. Odam, and against him and defendant Tally as sureties of James Odam on a bond as guardian of complainants given in February, 1860, and against said P. C. Tally as guardian, who in February, 1851, was appointed their guardian after the death of the said James S. Odam. The object of the bill was to have an account of the moneys belonging to said minors, from the said guardians and sureties.

P. C. Tally in his answer, sets up the following state of facts by way of defence to his liability as surety on the bond of James S. Odam: That A. G. Odam left a will in which, among other

things, he provided that a certain negro woman named Louisa, should remain with his father, who was appointed his executor, and wait on his children, but if she would not do so peaceably, but became refractory so that she could not be controlled without punishment, then she was to be sold and the money retained in the hands of his executor, or loaned out and interest applied to support of his children. That the contingency having happened as was assumed, on which she was to be sold, a petition had been filed in the Chancery Court, the negro sold and bought by said Oldham the executor, (who had also been appointed guardian as we have seen), for the sum of \$1100. That before the court would permit this money to be paid over to the guardian, it had required he should give an additional bond for the safety of the funds, and that A. N. Fisher and T. J. Jetton were the sureties of Odum on this bond. Tally insists in his bill that the sureties on this bond, if anybody, are liable to complainants for the price of the woman Louisa, on the ground that they interposed themselves between the former sureties, and the money was paid on the faith of this bond and the sureties on the same. He makes this answer, what he calls a cross-bill, and makes the two sureties alone parties to it. They come in and answer the same without objection, and the case was thus heard, the Chancellor decreeing that these two last named sureties were primarily liable to complainants in the original bill for the price of the negro woman, and Tally only secondarily liable for the same. From this decree defendants to the cross-bill, Fisher and Jetton, appeal to this court.

Before we proceed to a discussion of the question mainly debated before us, as to the order of the liability of the two sets of sureties, it is obvious that this decree is erroneous in this: That the original bill is not filed against Fisher and Jetton, they have never been made parties to it in any way, there was no issue in the pleadings as between the complainants in that bill and the appellants, no decree sought against them in any way; and therefore they were not liable to any decree on the original bill, nor could the complainants in this way be rightfully compelled by the defendant in the original bill to take such a decree, or be delayed in the prosecution of their rights by the interposition of these third parties into the litigation at the suit of said defendants. This must be so, unless we hold that a decree may be made against a party who is not a defendant, and not charged by any facts stated in the bill; in a word, without any pleadings affecting said parties in any way.

But the question is presented on the facts of what is called



the cross-bill and proof, as to the liabilities arising as between the parties to it, to-wit, P. C. Tally and Fisher and Jetton, the sureties on the bond taken in the Chancery Court.

It is urged, however, that this is not a cross-bill as authorized by the Code, section 4323, providing that "the defendant may, by proper allegations, file his answer as a cross-bill and require a discovery from the complainant, in which case demurrer or pleas may be filed, or other proceedings had upon the answer as upon a cross-bill. This seems to be correct, the statute contemplating that as the matter of the cross-bill should be in the answer to the original bill, its allegations as a cross-bill should be against the parties to the original bill, to which it is an answer.

We need but remark, however, that such a cross-bill need not necessarily be a bill for discovery specifically under this section of the Code, but may well be based on any proper matters of equity growing out of the original bill or connected with it, on which the respondent might be entitled to affirmative relief on a cross-bill, if filed separately.

But we think, under the liberal rules of practice known to our State and carrying out their spirit, the defendants having failed to demur or otherwise object to the matter alleged for cross-relief, and having answered and gone to a hearing on the same, we can well treat this as an original bill, in the nature somewhat of a cross-bill, perhaps, and settles the rights of the parties as presented by the issues formed between them on these pleadings.

The facts on which the rights of the parties in this branch of the case depend; that is, as between the sureties on the original guardian bond and the bond taken in the Chancery Court, are substantially as follows: James S. Odam being the guardian and Tally one of his sureties when the sale was confirmed, the court made the following order: that it appeared to the court that the children were minors, and the bond given in the County Court sufficient, it was ordered that the clerk and master pay over the fund to the guardian, but the decree adds: "It is further decreed to the clerk and master payable to the State of Tennessee for by the court for more and greater certainty that said guardian, James S. Odam, give an additional bond with sufficient security double the amount received for the negro, for the use of said minors, and that the clerk and master then pay over to the said guardian as above decreed." It is now insisted for Tally that the sureties on the last bond are primarily liable for said fund, and he was not liable until they are exhausted. As we have said, Tally has not by his cross-bill impleaded the complainants in the original bill, so as to have a decree to enforce this equity

in his favor against them, (if it be held to exist), and cannot ask a decree so far as they are concerned, that they be compelled to take their decree against the second set of sureties whom they have not sued, in preference to him. They clearly had the right to sue him and recover on his bond, and then the question might arise as to contribution between the sureties on the first and second bonds.

As to the question made in the cross-bill, that the second sureties are primarily liable and Tally only secondarily so, we hold that this transaction is the same in principle and in fact as the leading case of *Dering v. East of Winchelsea*, where Thomas Dering was appointed collector of duties, and gave a bond in the sum of £4,000 for the performance of his duties as such collector; afterwards two other bonds for the same purpose were given with different sureties. A bill was filed by the surety on the first bond, after judgment against him by the crown, for contribution on the part of the sureties on the second and third bonds, and the court decreed that they were liable to such contribution, directing that they should each pay their proportionable share, and the Attorney-General should on such payment being made, enter satisfaction of the judgment had at law; from which we infer that the crown was, by her officer the Attorney-General, party to the suit.

The case before us does not fall within the principle of the *Craythorne v. Swinburne*, 14th Ves., cited in *Fell on Guaranty*, 307. Where the second bond was conditioned to be void, if the parties to the first bond principal and surety paid the money; in other words, the last were simply sureties for the first. In such case the sureties on the first bond could not have contribution. In this case the two bonds are simply both given for the performance of the same duty by the guardian, and both cover the same fund and are to the same party; neither set of sureties can claim that one is liable before the other. On the face of the undertakings in view of the facts, they are liable to contribute equally for the money received by Odam for the negro, nothing else being in the way.

We can, however, make no final decree in the case in favor of the complainants in the original bill against the second class of sureties, Fisher and Jetton, because as we have said, they are not parties to complainants' bill. We only decide the nature of liabilities incurred by the parties to the cross-bill, the question made by them in their pleadings, and that the sureties on the second bond are not primarily liable in exoneration of Tally, as held by the Chancellor.

As to any equities that may exist as between Tally and the sureties on the last bond, which may be interposed to defeat his right of contribution when he shall have discharged his liabilities to complainant, or a judgment be rendered against him for the amount, we leave the parties free to litigate these matters by dismissing the "so-called" cross-bill without prejudice. As complainants in the original bill are before us by the appeal, we direct a decree against Tally, as surety of Odam, on the guardian bond of Odam for the money arising from the sale of the negro, and that he pay the costs of this court. The case can if desired, be remanded to the Chancery court for an account of the amount for which he is liable, and such other proceedings as may be necessary in the cause.

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R. J. BANGESS, *Executor, etc., et al.* v. E. C. PARTEE, *et al.*

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1. STAMPS.—WANT OF.—DOES NOT AFFECT DEED.—The want of revenue stamps does not affect the validity of a conveyance.

2. VENDOR'S LIEN.—SET-OFF TO.—NOT ALLOWED.—WHEN.—An intermediate purchaser of land who has sold, cannot set up a set-off against a vendor's lien.

3. JUDGMENT LIEN.—EXISTS.—WHEN.—AND HOW LONG.—Where the issuance of execution, within twelve months after the affirmance of judgment in the Supreme Court, is obstructed by an injunction or otherwise, the judgment lien still exists for twelve months after the removal of such obstructions, and if execution be issued (not levied or satisfied) contrary to legal prohibitions, it will not operate as a waiver of the judgment lien; while it would subject the party to punishment it will not affect the legal conveyances of the judgment.

4. CODE 2326.—DOES NOT AFFECT LIENS ACQUIRED IN LIFETIME OF INSOLVENT DECEASED.—Code 2326, this statute is not intended to affect liens acquired in the lifetime of the insolvent deceased debtor. The act was designed merely to abolish the preference which exists at Common Law, but not to affect any lien acquired in the lifetime of deceased.

CASES CITED.—1 Swan, 518; 8 Yer., 459; 5 Hum. 304; 4 Hum. 368; 1 Sneed, 354; 3 Head, 361; Code, 2983.

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DEADERICK, C. J., DELIVERED THE OPINION OF THE COURT.

Bangess, executor of Archy Partee, deceased, filed his bill in the Chancery Court at Columbia, on the 24th September, 1865, in which he alleges that he did on the — day of —, 1865, suggest the insolvency of the estate of said Partee to the County Court of Maury county.

The bill further alleges that on the 25th April, 1863, the testator sold and conveyed to one E. S. Jones 300 acres of land, part of a tract of 500 acres lying in said county of Maury at the price of \$10,500; \$10,000 of the price was paid at the time of the sale and the purchaser's note was taken for the \$500 remaining unpaid, due January 1st, 1864; the \$10,000 paid was Confederate money, and the \$500 note is still due and unpaid.

It is further charged in the bill that said Jones, on 27th August, 1863, sold and conveyed to defendant, T. H. Timmons, the said tract of 300 acres of land for \$25,000 in Confederate money; and that said Timmons had notice at the time of the sale and conveyance to him, that \$500 of the purchase money remained unpaid, and that a lien was subsisting upon the land, for it is insisted that lien should be declared for the whole of the price of said land, as the Confederate money paid was not a valid payment.

The bill also charges that a deed bearing date in 1861, but without attesting witnesses, was acknowledged by testator in October, 1863, conveying to his son's (E. C. Partee) wife Mary, the remaining 200 acres of the said 500 acre tract, for the consideration as expressed in the deed of \$7,500, but that no consideration was in fact paid; and that said Mary has died, leaving her husband and an infant child, Edward Partee, surviving her. It is charged that testator was at the time of making these conveyances, in the year 1863, about 70 years of age, feeble in mind and incapable of managing or disposing of his estate.

It is further shown by the bill that in 1861, the Union Bank obtained judgment in the Circuit Court of Maury county against testator for about the sum of \$3,500, which were taken by appeal to the Supreme Court and were still pending and undetermined in said court.

The bill further charges that if the claims for the land, etc., be realized the estate will be solvent, but if any considerable part of the same should not be realized, then the estate will be insolvent; that the personal estate left is of small value.

The widow, heirs and creditors of testator are made defendants and also the infant son and heirs-at-law of said Mary Partee, and the Union Bank is enjoined from prosecuting said suits pending in the Supreme Court; and all the creditors are in like manner enjoined by the fiat of the Chancellor upon the said 23th December, 1865, except that the Union Bank was allowed to prosecute its suit in the Supreme Court to an affirmance of its judgments, but was enjoined from issuing executions until the further order of the Chancellor.

Judgment *pro confesso* was taken against Jones; Timmons answered and admitted that he purchased the land of Jones and paid for it, with knowledge that \$500 of the purchase money was still due from Jones, and does not contest that that sum constitutes a lien upon the land. But he says that testator owed him at the time of his death more than \$500, and claims the right to set-off his claim on testator against the amount remaining due from Jones for the land. Timmons also states in his answer that before the bill was filed he sold and conveyed the said tract of 300 acres of land to his son, J. K. P. Timmons for a valuable consideration.

E. C. Partee, the son of testator and husband of Mary, states in his answer that down to some time in 1863, testator had means sufficient to pay his debts, and became insolvent by loss of his slave property.

He states that in 1859, testator proposed to him to take 150 acres of his land at \$35 per acre; that he declined to do so, whereupon testator urged him to take it, saying he could pay for it when it suited him, and if he never paid for it it would make no difference to him. Respondent accepted the proposition, regarding it as an advancement to him; no conveyance was then made.

In 1861, the proposition was made by testator, that if respondent and his wife Mary, would give him a power of attorney to draw the money due said Mary from her father's estate he would retain \$2,000 of it, and in consideration thereof he would make her a deed to 150 acres of the land.

The power of attorney was executed but no money was ever received upon it. After this, respondent alleges that he paid his father \$2,400 in Confederate money upon his agreeing to make title to the 150 acres.

The deed, acknowledged October, 1863, was made for 200 acres instead of 150; respondent states that he does not know why this was done unless it was for the \$400 paid over and above the \$2,000, but insists that he paid \$2,000 for the 150 acres and that this was all he claimed therefor; and that the 50 acres additional conveyed was either intended as a consideration for the \$400, or as a voluntary gift.

The Union Bank also answered the bill, and files its answer as a cross-bill, making the parties to the original bill and J. K. P. Timmons, the purchaser of the 300 acre tract, defendants, insisting on the lien of its judgments and praying the court to order the sale of the land to enforce said liens, and to that extent to modify the injunctions granted.

Bangess, the executor, filed an amended bill making J. K. P. Timmons a defendant, and alleging that his father, S. H. Timmons, about the time of the filing of the original bill, fraudulently conveyed the 300 acres of land to said J. K. P. Timmons; that the son was a young man without means, living with his father, and knew that the land was not paid for and that he had not paid for it.

J. K. P. Timmons in his answer, admits that he purchased of his father the 300 acres of land and took a conveyance of it 10th Sept., 1865; that he agreed to give \$12,000 for it in five equal annual installments; he denies fraud, but admits that he has not paid anything for the land, and does not deny that he had knowledge that \$500 of the purchase money was due from Jones for the land.

In the Supreme Court, the testator having died in Nov., 1863, the suits of the Union Bank were revived against Bangess, the executor, and judgments of the Circuit Court were affirmed Feb. 2, 1866.

Upon these judgments executions were issued 26th March, 1866, and returned not satisfied. At October Term, 1868, the Chancellor rendered a decree setting aside the conveyances to Jones and to Mary Partee, upon the ground that the deeds were not properly stamped, and because having been paid for in Confederate money they were not executed upon any valid or legal consideration.

The Chancellor directed that accounts of the rents and profits should be taken and the parties in possession should be charged therewith, and that an account of the assets and debts of testator be taken, and also directed that the parties in possession of said land should be dispossessed and that the master should sell the same for the payment of testator's debts, and that the Union Bank was not entitled to priority of satisfaction of its judgment out of the lands over the other creditors of the estate holding claims by notes or accounts.

From this decree, S. H. Timmons and J. K. Timmons, Allen, Trustee of the Union Bank, and S. C. Partee, Jr., have appealed to this court.

The decree is erroneous in setting aside the conveyance of the lands for the reasons stated therein. It has been repeatedly held that the want or revenue stamps does not affect the validity of the conveyance, and quite as often decided by this court that Confederate money, voluntarily and understandingly accepted by a vendor, is a valuable consideration and will support a conveyance of land, or transfer and sale of personalty.

The conveyance to Jones was free from fraud on his part as well on the part of testator. He was perfectly competent to contract, indeed there is no proof in the record to raise any suspicion of the competency of testator at the time of the execution or acknowledgement of either of the deeds in question.

The lien for the \$500 of unpaid purchase money of the tract sold to Jones still subsists upon the land. It is shown satisfactorily that it was intended to be retained at the time of the sale; and S. H. Timmons admits his knowledge of its existence at the time he bought land of Jones, and does not controvert its validity. And it is most probable J. K. P. Timmons knew of its existence when he took the conveyance from his father. At all events he does not deny knowledge of it, although it is expressly charged; and he furthermore admits that he has not paid any part of the price of said land, he does not and could not rely upon the plea of innocent purchaser. S. H. Timmons cannot set-off any debts he may have against testator's estate, against the debt due for purchase money.

The debt for purchase money is due from Jones and is a lien upon the land, and S. H. Timmons does not owe the debt, and sets up no claim to the land, having conveyed it to his son.

The conveyance to Mary Partee of the 200 acres, according to the statement of her husband, Ed. C. Partee, seems to have been made for little or no consideration. He states that in 1859, his father urged him to accept a conveyance of 150 acres of the tract; at a later period he agreed with his father to take a deed for 150 acres, and to give him a power of attorney to draw \$2,000 to pay for it from his wife's father's estate. The power of attorney was executed, but no money was ever drawn upon it and no conveyance was executed for the land until in the summer of 1863; a deed was made to the wife of the son for 200 acres, being the remainder of the 500 acres left, after the sale of the 300 acres of Jones.

The deed is dated 6 January, 1860, but is shown to have been written and executed some time in 1863, and after the deed was executed to Jones and registered, and purports upon its face to have been executed for the sum of \$7,500 paid to the maker or bargainor.

The consideration actually paid, according to the son's statement was \$2,000 in Confederate money for 150 acres, but he alleges that he paid his father \$2,400 in Confederate money, and he supposes the 50 acres over and above the 150, was conveyed in consideration of the \$400 paid over the stipulated price of \$2,000.

The land is shown to have been worth \$35 per acre, and if the proof were full and satisfactory as to the payment of the \$2,400 the sale could not be sustained under the circumstances of this case.

Without the proceeds of the 200 acres of land the estate would be insolvent; with them and the other assets there will most probably be a sufficient amount to pay the debts.

The testator, it appears, incidentally had some slaves, but it is manifest that at the time the conveyance was made of the 200 acres of land, such property was held in that locality by a very insecure and uncertain tenure.

It also appears that about the time of the alleged payment to testator of the \$2,400, the son, Ed. C., received for his father from the sale of cotton upwards of \$2,400 in Confederate money, which he admits he did not pay over to him.

We are therefore of opinion that the conveyance of the 200 acres was made under such circumstances as that it cannot be permitted to prevail against the rights of creditors; and especially must such conveyance be held invalid as against the judgments of the Union Bank. These judgments were obtained in the lifetime of testator in the Circuit Court of the county in which the lands are situated and where the debtor resided at the time of their rendition, and were a lien upon his land from the time they were rendered. Code, section 2980. Appeals were taken to the Supreme Court. This did not release the liens, but merely suspended their enforcement.

When there is no impediment to issuance of an execution, the lien exists for twelve months only from the rendition of the judgment. Code, 2982.

But if the sale within twelve months is prevented by injunction, writ of error, appeal in the nature of a writ of error, or other adverse proceeding in court, the lien continues provided the creditor sells within one year from the removal of such obstruction. Code, 2983, and a sale made within a year after the removal of restraining process of the court, overreaches and avoids all intermediate alienations made by the judgment debtor. 1st Swan.. 518; 8 Yer. 459; 5 Hum. 304.

In this case, which arose under the act of 1831, Ch. 90, and which is not as comprehensive as section 2983 of the Code, the court held that a party prevented by process of law from effectuating his lien should have a year within which to sell after the obstruction was removed.

Nor do we think that the issuance of executions upon the affirmance of the judgments in the Supreme Court, against the



the executor and the sureties on the appeal bond, which were not levied nor satisfied, operated as a waiver of the judgment lien.

The executions may have been issued by the clerk without instructions from the plaintiff, under and by virtue of the mandatory provisions of section 3003 of the Code, requiring him to issue executions within sixty days after the adjournment of each term of the Court. Or they may have been issued inadvertently by plaintiff's order. If done wilfully, such violation of the injunction would subject the party to liability to punishment for contempt, but would not affect the legal consequences of the judgments, nor impair his rights under them.

But it is insisted that the bill in this case is filed as an insolvent bill, and that the filing of such a bill displaces the lien of the judgments acquired in the lifetime of deceased and preserved as we have seen by section 2983 of the Code, and puts the judgment creditor upon the same footing as all other creditors. Code 2326. That statute was not intended to affect liens acquired in the lifetime of the insolvent deceased debtor. The act was designed merely to abolish the preference which existed at common law, but not to affect any lien acquired in the lifetime of deceased. 4 Hum. 368; 1 Sneed, 354; 3 Head, 361.

The allegations of the bill is that if the sale of the lands is set aside the estate will be solvent, otherwise it will be insolvent. The debts due the Union Bank constitute the larger proportion of the indebtedness of the estate, and after the satisfaction of the lien of the bank by the sale of the land, it may turn out that sufficient assets may be realized to pay the debts. Be this as it may, we hold that the Union Bank has still a valid subsisting lien upon the whole of the land for the satisfaction of the judgment in its favor, and these liens must be satisfied out of the 200 acres conveyed to Mary Partee in the first instance, the sale and conveyance to her being in our opinion fraudulent as against testator's creditors and must be set aside, and if the proceeds of the sale thereof is more than sufficient to pay the debts due the Union Bank, the residue will be distributed among such of the creditors as may have established their claims. If the sale of the 200 acres does not yield a sufficient sum to pay the bank debt, then the land sold to Jones by testator, being the 300 acres now claimed by J. K. P. Timmons or so much thereof as may be sufficient for the purpose shall be sold to make up the deficit; and said 300 acres or sufficiency thereof shall be sold to pay the \$500 and interest of unpaid purchase money on such terms as may be prescribed by the Chancellor for which it is liable.

The decree of the Chancellor is reversed, and a decree will be

entered here in conformity with this opinion, and the cause will be remanded to the Chancery Court for the execution of the decree of this court, and for such other and further proceedings and accounts as may be necessary to a complete and final settlement of the rights and equities of the parties. One-half the cost will be paid by the executor out of the funds of the estate, and the other half will be paid equally by S. H. and J. K. P. Timmons.

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MERRIMAN, *Administrator v.* JOHN CANNOVAN, *et al.*

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Jackson, April Term, 1877.

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*Arguendo.*

1. FEME COVERT.—CONTRACT WITH.—SURVIVES TO HER.—Where the interest of creditors is not affected, an agreement with a *feme covert* and a promise to her personally with the assent of her husband, raises the presumption that she is the meritorious cause of such agreement, and it will survive to her, held to be the rule at law as well as in equity.

CASES CITED.—4 Danna, R., 333; 9 B. Mon., 365; 2 Maule & Sem., 396; 5 Wheat, 148; 3 Stewart, 375; 12 Ves., 497; 17 Ark., 154; 10 Ala., 782; Mers. & Wells., 323; 10 Bosw., 314; 1 Rawl. Rep., 455; Borst v. Spelman, 4 N. Y. Rep., 184; 16 Mass., 683; Tyler Inf. and Cov., 384.

2. STATUTE OF LIMITATIONS.—MUST BE PLEADED.—WHEN.—When the statute operates only on the *remedy*, it must be pleaded; *ore tenus* defence not admissible.

CASE CITED.—10 Yerg, 119

3. STATUTE OF LIMITATIONS.—DOES NOT BAR DEBT.—FOR MONEY BORROWED FROM TRUSTEE.—WHEN.—If a trustee loans the trust fund in breach of the trust, and the borrower has notice of the trust and the breach, he becomes a *quasi* trustee, and he cannot separate the loan from the trust, nor insist that the statute of limitations, which bars a loan as a loan, also bars the remedy for the trust fund in his hands, and if it be followed into the hands of one who receives it by collusion or with express notice of the trust, he cannot plead the statute of limitations, for the reason that he himself becomes a trustee, and the fund can be recovered.

CASES CITED.—Perry on Trusts, 832, section 836; Id. 840-859; Earnest v. Croysdill, 6 Jur., 740; Rolf v. Gregory, 11 Jur., 97; 3 How. 33; 11 Hump. 457; 3 Ned. Eq. 567; 7 Allen, 499.

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SNEED, J., DELIVERED THE OPINION OF THE COURT.

The complainant, as administrator, recovered a judgment at law against the defendant, John Cannovan, for \$4,345.65, upon which an execution was issued and returned *nulla bona*.

He thereupon filed this bill for the purpose, among others, of subjecting the indebtedness of defendant, Thomas H. Cocke, to

Cannovan, to the satisfaction of said judgment. The defendant, Cocke, is regularly made a party defendant to the bill; his indebtedness to Cannovan is attached, and he is called upon to discover his said indebtedness. His answer discloses an indebtedness to Cannovan by open account in the sum of about \$1700, but he discovers also an indebtedness on the part of Cannovan to himself in two notes of \$1,000 each, executed by Cannovan to the guardian of said respondent, and demands that the same be set-off against his said indebtedness to Cannovan. The original bill in the cause was filed on the 24th October, 1866. The notes upon which the respondent's demand of set-off is predicated, were executed to Mrs. Isabella M. Houston, a *feme covert*, the grand-mother and with her husband guardian of the respondent; and as the proof abundantly shows were given for borrowed money of the trust fund in her hands which she loaned to Cannovan, who had full notice that the moneys so borrowed by him were of the said trust fund, and the property of the respondent. The said Isabella M. Houston became discovert by the death of her husband in 1863, and upon the respondent attaining his majority in 1866, the notes were turned over to him by her as his property. These notes were not under seal, and were dated respectively the first the 1st of January, 1855, and the second 1st of January, 1859. The first falling due 1st January, 1858, and the second January 1st, 1859.

The answer of the respondent Cocke, was filed on 11th June, 1867. Afterwards the complainant filed an amended bill and the defendant, Cannovan, a supplemental answer, and neither party resorted to the statute of limitation as a defence against the notes; nor is the statute invoked in any other form of written pleading. It is stated here in argument, that the statute was relied on in argument below by oral plea. The Chancellor gave the complainant a decree against the respondent Cocke, for the amount of his indebtedness to Cannovan, but refused to allow the set-off upon the ground that the notes were barred by the statute of limitations. The respondent Cocke has appealed, and the only question now before us is as to the application of the statute of limitations under the facts of the case.

We are constrained to differ with the Chancellor, as to his conclusion in this case. In the view we have taken of the case it is not necessary to consider the argument submitted as to the operation of the statute of limitations upon the notes while in the hands of the payee, Mrs. Houston, and before they were delivered to their real owner, the respondent.

A very plausible if not conclusive argument against the opera-

tion of the statute might be predicated upon the doctrine of the law applicable to the relation of husband and wife, upon the peculiar state of facts under which these notes were held by the payee, Mrs. Houston, before and after she became discoverer.

If that theory be the true one, then the notes even in the hands of Mrs. Houston, would not have been barred at the time the respondent's right accrued. And many respectable authorities may be cited in support of this view, which we do not, however, propose to elaborate, as another question must be decisive of the case.

Upon this question, without resting this adjudication upon it, we content ourselves with a reference to some of the authorities. 4 Dana R., 333; 9 B. Mon., 365; 2 Maule & Sem., 396; 5 Wheat, 148; 3 Stewart, 375; 12 Ves., 497; 17 Ark., 154; 10 Ala., 682; 6 Mers. & Wells., 423; 10 Bosw., 314; 1 Rawl. Rep., 455; Borst v. Spelman, 4 N. Y. Rep., 284; 16 Mass., 483.

In one of these cases it is said that where an obligation or contract is taken to the husband and wife, or the wife alone with the assent of the husband, the action survives to the wife, who is entitled to the proceeds as against the heirs and representatives of the husband.

In such a case the form of the security implies a design by the husband to benefit the wife, and the law will give effect to this intention when the interest of creditors is not affected. Indeed, an agreement with a *feme covert* and a promise to her personally, raises the presumption that she is the meritorious cause of such agreement, and it will survive to her. This is held to be the rule at law as well as in equity. Borst v. Spelman, 4 N. Y. Rep., 284; Tyler Inf. and Cov., 384. But we do not care to pursue this doctrine as applicable to this case under the hypothesis that the notes in controversy indicate a conversion of the trust fund. Nor is it necessary to discuss the question whether the statute of limitations could be available in this case at all, without being in some manner invoked in the written pleading. It has been regarded, however, at least since the case of Maury v. Lewis, 10 Yerg., 119, as the law, that in a case like this, where the statute operates on the remedy only, it must be pleaded or the party cannot avail himself of it. The answer says the court in that case, does not rely upon the statute of limitations, and therefore, the defendant cannot now insist upon it. The case of Kegler v. Miles, Mart. & Yerg., has no application here. This is not a suit for specific property, the possession of which confers a title. In a case like this the statute operates only on the remedy, and in such a case says Judge

Green, according to all the books it must be pleaded. The case *Owens' Heirs v. Stubblefield*, decided at Sparta in 1833, was like this. The court there held that the parties could not have the benefit of the statute of limitations because they had not relied upon it in their answers. 10 Yerg., 119. But, apart from all these considerations, there are strong equities growing out of the peculiar facts of this case, which in a court of conscience should brand this irregular and anomalous *ore tenus* defence of the statute of limitations, as one not to be favored, if they do not indeed operate as an effectual estoppel in the view of a court of equity.

It appears that the account of Cannovan against Cocke sought to be subjected to the complainant's debt, was for moneys and merchandise furnished the respondent Cocke by Cannovan, when the former was a minor, to many of which items the minority of the respondent would have interposed a valid defence, not being necessities, and that respondent after his majority affirmed and ratified the voidable contract upon the express condition that these notes were to be taken into the settlement. The defendant, Cannovan, expressly acknowledged that he owed the notes and promised to pay them and to bring them into settlement. There seems to be some doubt upon the proof whether he did not annex the further condition that his claim for improvements upon certain leased property of the respondent was also to be brought into the settlement, but it is sufficient for our purpose in illustrating the equities of the parties, to know that it is abundantly shown that the respondent would not have ratified the voidable contract upon which he is now sued, but for the express understanding that upon a settlement these notes were to be recognized as valid and subsisting debts due to the respondent from the defendant, Cannovan.

The proof is in conflict as to the precise character of Cannovan's recognition of the notes, some of the testimony showing that it was conditional upon a settlement of all matters between the parties, and other portions of it to the effect that he admitted the justice of the notes, and promised absolutely and without condition to pay them, only stating that he could not pay them then for want of money. While in this state of proof, therefore, we do not undertake to adjudge that the promise was of that character which would revive the debt if barred, yet we cannot under such a state of facts, "strain the timbers of the law" so far as to favor an *ore tenus* defence of this kind under this state of facts, however much we might be disposed in a proper case to relax the stern rules of pleading upon this subject.

But we rest our decision of the cause upon another question. We have seen that these notes were given for the loan of the trust funds of the respondent in the hands of his guardians, and it appears beyond all controversy that the defendant Cannovan, was well advised of this fact. Under such circumstances a court of equity will not tolerate the statute of limitations as a defence against the recovery of the money. It is a matter of public statutory law which the defendant Cannovan, was bound to know, that the lending of trust moneys upon no security at all as in this case, was a breach of the trust. And by borrowing this respondent's money with a full knowledge of the fact that no security was required or given, the defendant, Cannovan, upon well established principles, made himself a *quasi* trustee, and subject to all the burdens and liabilities of that relation. Thus, it is said, if a trustee loans the trust fund in breach of the trust, and the borrower has notice of the trust and the breach, he becomes a *quasi* trustee, and he cannot separate the loan from the trust, nor insist that the statute of limitations, which bars a loan as a loan, also bars the remedy for the trust fund in his hands. Perry on Trusts, section 832. The *cestui que trust* may follow the fund into any new investment in which it may be clearly identified. *Id.*, section 836. And if it be followed into the hands of one who receives it by collusion or with express notice of the trust, he cannot plead the statute of limitations, for the reason that he becomes himself a trustee. *Id.*, 840-859; *Earnest v. Croysdill*, 6 Jur. 740; *Rolfe v. Gregory*, 11th Jur., 97; 3 How. 333; 11 Humph., 457; 3 Ned. Eq., 569; 7 Allen, 499.

We think these principles are sound, and have no hesitation in applying them here as decisive of the equities of these parties upon the case presented.

The result is that the Chancellor's decree must be modified so as to give the respondent the benefit of his set-off.

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Judge Freeman does not concur in this opinion, so far as it precludes the plea of the statute of limitations, on the ground of the trust relation of Cannovan to the fund in controversy, but is inclined to the opinion that he would be precluded from relying on the statute upon other grounds.

JENNY RICHARDSON, *Adm'x*, v. WM. RICHARDSON,  
*and others.*

Jackson, April Term, 1877.

1. WRIT OF ERROR—SUPERSEDEAS—DISMISSED—WHEN.—Where a cause is pending in the Supreme Court by writ of error and supersedeas, generally the supersedeas will not be discharged on motion because there is no error in the decree sought to be reversed; this would determine the entire case upon the motion; but where a supersedeas has been improperly granted, the decree being insufficient to warrant a writ of error, it may be discharged by the court.

2. INDIVIDUAL CREDITORS.—Individual creditors are entitled to priority over firm creditors in the distribution of the individual estate.

CASES CITED.—Jackson Ins. Co. v. H. A. Partee, et al.; Pennington v. Bell, 4 Sneed 202.

M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

This is a bill to administer the estate of C. G. Richardson, dec'd, as an insolvent estate. Certain creditors of a firm, of which C. G. Richardson was a partner, filed claims, which were rejected, but a writ of error *coram nobis* was sued out by the creditors. The Chancellor refused a motion to dismiss this writ, retaining it for future consideration. But as individual debts had been reported and allowed sufficient to absorb the entire assets, the court holding that the individual creditors had a prior right to satisfaction out of the individual estate, ordered the distribution to proceed, notwithstanding the pendency of the unadjudicated claims of the firm creditors. This order has been superseded by the fiat of a judge of this court, and the motion now is to discharge the supersedeas upon the ground that the holding of the Chancellor, as to the prior right of the individual creditors, is clearly correct, and the order to distribute the fund among them was proper, no matter whether the claims of the firm be finally adjudicated or not. When a cause is pending in this court by writ of error and supersedeas, we have held that generally we will not discharge the supersedeas on motion upon the ground that there is no error in the decree sought to be reversed; that this would be determining the entire case upon the motion. The question whether there be error in the decree comes upon the hearing of the cause. But we think it is different where a supersedeas merely has been granted or is pending without writ of error. In such case, if improperly granted, it may be discharged by the court. Although a writ of error was granted in this case, we think it should be dismissed. There was certainly no such final decree against the petitioners as to

allow them to prosecute a writ of error, the writ of error being dismissed the supersedeas alone remains. Taking it then as a case of supersedeas, without writ of error, should the supersedeas be discharged? If the decree of the Chancellor holding that the individual creditors were entitled to priority, and ordering the fund distributed to them, was erroneous, then it was properly superseded, otherwise the petitioners would lose their share of the fund before they could obtain a final hearing, and it would be proper to supersede the order until the petitioners' claims were adjudicated and they could bring up the case to have the decree of the Chancellor corrected, but if the Chancellor's decree was correct, then the supersedeas should not have been granted and should now be discharged.

The petition for writ of error and supersedeas does not assign any error in the action of the court in allowing the claims of the individual creditors, but assigns as error the action of the court in allowing the fund to be distributed to the individual creditors before passing upon the claims of the firm creditors. If there was no error in adjudging the validity of the claims of the individual creditors, and they were entitled to priority, then there could be no error in the action of the court, as the firm creditors could not be injured by it.

This court held, at the April term, 1872, in the case of the Jackson Insurance Co. v. H. A. Partee, et al., that individual creditors were entitled to priority over firm creditors in the distribution of the individual estate, following the case of Pennington v. Bell, 4 Sneed 202, and many other authorities; without overruling this authority we could not reverse the decree of the Chancellor as the petition for supersedeas assigns no error, his decree therefore should not longer remain superseded.

Let the writ of error and supersedeas be dismissed.

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## SAMUEL MAYNARD v. THE STATE.

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I. FORFEITURE OF FEES BY OFFICER—WHEN.—In cases where the Legislature has made the performance of any duty pertaining to an office, a condition upon which fees or salaries are to be paid, the officer is not entitled to demand his fees until such duties are performed.

*James C. Bradford.*



2. CLERKS OF CIRCUIT COURT.—Clerks of Circuit Court shall forfeit their costs as provided in Sec. 5242 and Sub-Sec's 6 and 7 of the Code.

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TURNEY, J., DELIVERED THE OPINION OF THE COURT.

The motion of the Attorney-General, that the clerk of the Circuit Court shall forfeit his costs, as provided in Sec. 5242, Sub-Sec's 6 and 7 of the Code, must be allowed.

Here we have a record in all material parts well made and indexed; we can see that pains have been taken to have it in all essential portions correct, and the things omitted are declared by the statute not to make error because omitted, yet the forfeiture is affixed.

In this case we feel that the statutory regulations operate harshly *ita lex scripta est*, and we have no discretion beyond its strict observance, holding in all cases, in which the Legislature, having the power, has made the performance, discharge of any duty or duties pertaining to an office, a condition upon which fees or salaries are to be paid to the office-holder, that until such duty has been performed, such condition complied with, the officer is not entitled to demand or receive the fees or salary affixed by law to his office; until these conditions shall have been complied with he has no more legal right to receive fees or salaries than does a stranger to the office.

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LUKE C. WRIGHT, *Attorney-General, etc.*, v. COUNTY OF SHELBY.

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Jackson, April Term, 1877.

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1. ATTORNEY-GENERAL.—MOTION AGAINST CLERKS.—In pursuance of his duty under section 3228 of the Code, the District Attorney-General can have his motion against delinquent clerks, at any time until the proper statute of limitations forms a bar.

2. ATTORNEY-GENERAL.—WHAT FEES ALLOWED.—The Attorney-General is entitled to a fee of two and a half dollars, in each case of failure by clerk to enroll cases determined in his court.

3. COUNTY LIABLE.—FOR FEES.—WHEN.—In cases where execution upon the motion is returned *nulla bona*, the county in which such motion is made is liable for fees of Attorney-General.

FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

Plaintiff, as Attorney-General, moved for judgment against Boyle, clerk of the second Circuit Court of Shelby county, in the city of Memphis, for failure to enroll cases determined in his court, in which he had collected enrolling fees. There was upwards of 1,900 cases in which such failure had occurred. Judgments were had in all the cases in favor of the county trustee, for the use of the county against said clerk. These motions were made by order of the court, upon report of the fact of delinquency on the part of the clerk, made by the Attorney-General.

The motions were made under section 3228 of the Code, which is as follows: "Each district attorney of this State, shall examine the offices of the clerks of his district at any term of the court, whether enrolments have been properly made or fees charged for enrolments not made, and shall proceed against the clerk guilty of official delinquency, and move for the fees illegally charged, and shall receive a tax fee of five dollars in each case."

The judgment rendered against the clerk amounted to upwards of five thousand dollars, and a tax fee was ordered in favor of the Attorney-General of five dollars in each case, together with other costs, for which an execution was awarded. The execution was returned by the sheriff *nulla bona*, and thereupon the Attorney-General, in January, 1876, moved the court for judgment over against the county of Shelby, based on said return for the amount of his fees, to-wit, five dollars in each case, as adjudged in the original judgment against Boyle, and asked the court to certify the same to the chairman of the County Court for payment.

The court refused the motion, holding the County not liable for such fees by law, and taxed the Attorney-General with the costs of his motion. A bill of exceptions was tendered and the case brought by appeal in the nature of a writ of error to this court. The question is, as to correctness of this ruling of the court below.

Boyle was elected clerk in March, 1870, and went into office 1st of September; Wright was elected Attorney-General in 1870. The motions were made against Boyle in May, 1875, and judgment rendered in July of that year. The cases in which Boyle was delinquent had been accumulating for each year of his official term, only one hundred and eighty-seven of them being for the year 1874, the last year in which he was clerk.

It is, perhaps, proper to state, that Boyle himself was known by the Attorney-General to be insolvent at the time the motions were made, but that one or more perhaps of his securities on his official bond was understood to be good and solvent.

The ruling of the judge below in this case is sought to be maintained in argument here on several grounds, which we proceed to notice so far as we deem material to the decision of the question before us.

It is insisted the motions could only be made at each term of the court after it occurred, the statute allowing the clerk six months after determination of cases in which to perform this duty, and the section 3228 requiring the Attorney-General to make his examination of the offices of the clerks at any term of the court. The examination is to be made by the district attorney at each term of the court, and the proceeding is expected by the statute to follow as a matter of course, the ascertainment of the offence; but it does not follow that if for any cause the Attorney-General has failed to ascertain the delinquency at the first term, or even failed to make the motion when he did ascertain it, therefore it could not be made at all. Time was not intended to be essential to the right in this case, in fact the Legislature did not intend to fix the first term after the offence, as the only one at which the motion should be made, but only provided it should be done after ascertainment of the liability; as a matter of course, the motion would be subject to the bar of the proper statute of limitation.

We think there is nothing in the objection. Nor do we think there is any objection to the fact of making a motion in each case where the clerk has been delinquent. The statute by its language, evidently contemplates a motion in each case of failure, and gives the Attorney-General "a tax fee of five dollars for each." In the case of Alston before us some years since, motions were made in each case, and judgments rendered on the cases before us separately, although this objection seems not to have been urged by the learned counsel who argued that cause.

The main question in this case, and the one on which it must turn is, whether the county is liable under the Code to pay the fees taxed in favor of the Attorney-General at all. This being a question depending entirely on statutory provisions, we proceed to examine what is the law on this question.

In addition to the provision in 3228, giving a tax fee of five dollars in such case, section 4542, sub-section 15, gives the fee of five dollars. For proceeding against clerk for delinquency in enrolling cause, section 4543 provides that the fees in the foregoing section are to be taxed in the bill of costs and collected from the defendant whenever prosecutions or proceedings have been successful. The next section provides, where the prosecutions and

proceedings have been unsuccessful, *or the money cannot be collected* from the defendant, or the prosecution is charged with the costs, the fees of the Attorney-General are paid out of the State or county treasury, as other costs in criminal cases.

It is somewhat ingeniously argued that the section 4544, there must "be prosecutions and proceedings," and that as this is held to be a civil proceeding, the two elements were not combined in the case, that authorize the payment of the costs by the county.

[*This Opinion will be concluded in the next number.*]

## General Legal Information.

### ABSTRACT OF DECISIONS OF THE SUPREME COURT OF TENNESSEE.

[From advance sheets of 9 Heiskell's Reports.]

**DOWER—VENDOR'S LIEN.**—A vendor's lien for unpaid purchase money is superior to the widow's right of dower. Opinion by Deaderick, C. J.—*Boyd v. Martin*, p. 322.

**LIMITATIONS—NEW PROMISE.**—A mere payment upon a debt, without other acknowledgment, is simply an acknowledgment of indebtedness to the extent of such payment, and is no new promise to pay the remainder. Opinion by Deaderick, C. J.—*Lock v. Wilson*, p. 784.

**PRACTICE—PLENE ADMINISTRATIV—BURDEN OF PROOF.**—In an issue on the plea of *plene administravit*, the burden of showing assets is upon the plaintiff. Citing 11 Vin. Ab. 349; 2 Phil. Ev. 295; 6 Com. Dig. 311. Opinion by Sneed, J.—*Gilpin v. Nooe*, p. 192.

**BANK—DEPOSIT.**—If a teller receives money from a depositor for deposit to his credit, without a deposit-ticket or pass-book, and by mistake credits the money to the wrong person, the bank is liable therefor to the depositor; though such an act be contrary to the rules and general custom of the bank. Opinion by McFarland, J.—*Jackson Ins. Co. v. Cross*, p. 283.

**SUPREME COURT—PRACTICE—FORMER ADJUDICATION.**—A former judgment of reversal, in the Supreme Court, is conclusive of nothing save that the cause was reversed. The opinion then declared as to the law

is in no respect binding upon the court upon a subsequent appeal. Opinion by Freeman, J.—*Bynum v. Apperson*, p. 632.

**BILLS AND NOTES—INDORSER.**—A third party who indorses a note before it has been indorsed and transferred by the payee, becomes a second indorser only; the payee is in legal contemplation the first indorser, though, in fact, he did not first write his name on the paper. Opinion by Sneed, J.—*Binckley v. Boyd*, p. 149.

**COMMON CARRIER—INEVITABLE ACCIDENT.**—A carrier is not liable for the loss of goods caused by an unprecedented flood, where no warning was received, sufficient to reasonably awaken apprehensions of danger. Citing *M. & C. R. R. Co. v. Reese*, 10 Wall. 176; *Denny v. N. Y. C. R. R. Co.*, 13 Gray, 481. Opinion by Deaderick, J.—*Lamont v. N. and C. R. R. Co.*, p. 58.

**STATE ARBITRATION—AWARD.**—The state may divest itself of its sovereignty, and meet its citizens on equal terms, in referring matters in dispute to arbitrators; and such arbitration will be governed by the rules of law applicable to private parties, and the State will thereby waive her reserved exemption from suits, so far as the award is concerned. Opinion by Nicholson, J.—*State v. Ward*, p. 100.

**INJURIES RESULTING IN DEATH—DAMAGES.**—Where a wife sued as administratrix, for damages resulting from the death of her husband, an employee of the defendant, a railroad company, it was erroneous

to instruct the jury that they might in assessing damages, consider "the shock to the feelings of the wife." Opinion by Nicholson, C. J.—*Nashville and Chattanooga R. R. Co. v. Stevens*, p. 12.

**MUNICIPAL CORPORATION — GARNISHMENT** — A municipal corporation is not subject to garnishment at the suit of a creditor of one of its employees. Citing *Bank v. Dibrell*, 3 Sneed, 379; *Burnham v. Fordulac*, 15 Wis. 193; *Chicago v. Hasley*, 25 Ill. 596; *Baltimore v. Root*, 8 Md. 102; *Hawthorne v. St. Louis*, 11 Mo. 59. Opinion by Sneed, J.—*Memphis v. Laski*, p. 511.

**TAXATION — ASSESSMENT — PUBLIC IMPROVEMENTS**. — An assessment for the new paving of a street in a city made alone upon the lots fronting on the streets to be improved, in proportion to their frontage, is unconstitutional and absolutely void. Citing *Chicago v. Larred*, 34 Ill. 263. Opinion by Freeman, J.—*Taylor v. Chankler*, p. 349.

**ATTORNEY — LIEN — PRACTICE**. — An attorney has a lien upon real estate recovered for his client, for the payment of his reasonable fees; and the court in the same case may declare such lien, but nothing more, if the client be *sui juris*; but if the client be under disability, a reference may be had to ascertain the amount of the fee, or proceedings under which the client must have actual notice. Opinion by McFarland, J.—*Perkins v. Perkins*.

**PRINCIPAL AND SURETY — EVIDENCE — DECLARATIONS**. — In an action upon a bond, against a surety, alleging covenants broken, the declarations of the principal, made after the breach complained of, are inadmissible. Citing 2 Grenl. Ev., sec. 187; *Snell v. McGavock*, 1 Swan, 208; *Transdale v. Phillips*, 2 Swan, 384. Opinion by McFarland, J.—*White v. German National Bank*, p. 475. *Wheeler v. State of Tennessee*, p. 393.

**FRAUDULENT CONVEYANCE — STOCK OF GOODS**. — A trust deed on a stock of goods in trade, reserving to the grantor the right to continue making sales in the usual course of business, and to replenish and increase the stock, etc., is fraudulent in law and void. Citing *Collins v. Myers*, 16 Ohio, 547; *Edgell v. Hart*, 9 N. Y. 213; *Griswold v. Sheldon*, 4 N. Y. 501; and overruling *Hickman v. Herrin*, 6 Cold. 135. Opinion by Freeman, J.—*Tennessee Nat. Bank v. Elbert*, p. 153.

**FACTOR — CONVERSION**. — A conversion, in the sense of the law of trover, is an appropriation of property to one's own use, or exercising dominion over it in defiance of the owner's right; and the mere selling of goods, obtained from an unauthorized agent, without knowledge of the principal's title, will not render a factor liable as for a conversion. Overruling *Taylor v. Pope*, 5 Cold. 413. Opinion by Freeman, J.—*Roach v. Turk*, p. 708.

**ARBITRATION — AWARD**. — Where the terms of a submission to three arbitrators provided as follows: "And thereupon the three shall try the case upon the testimony and argument of Counsel; it is further agreed, that the decision of the above referees shall be final;" it was necessary that all the arbitrators should unite in the award, and the decision of a majority would be invalid. Opinion by Deaderick, J.—*Memphis and Charleston R. R. Co. v. Pillow*, p. 248.

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LUKE E. WRIGHT, *Attorney-General, etc., v. COUNTY OF SHELBY.*

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Jackson, April Term, 1877.

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[CONTINUED FROM LAST ISSUE.]

The language is somewhat inartificial, but does not admit in fairness of this construction. The reference is evidently to the short fee bill given in the 18th sub-section of section 4542, which provides for certain fees in various cases, some of prosecutions; as for "each prosecution where the grand jury finds a true bill, but the case is terminated without a trial, three dollars for successfully prosecuting vendors of lottery tickets, twenty-five

dollars, and in other sections, for various *proceedings* against delinquents, among others *proceedings* against clerks for failure to enroll causes. It did not intend that there necessarily be both a prosecution—that is, a criminal proceeding, and also other proceedings in the same case in order to entitle the Attorney-General to his costs, but only uses the word proceedings in reference to the proceedings referred to as contradistinguished from prosecutions used in the section, thus providing for both cases.

The question in this case really must turn on the proper construction of the provisions of the Code we have just been commenting on, and if a proceeding like this, or this proceeding is one of the proceedings contemplated in Sec. 4544, then the question is, on a fair construction of its language and purpose in connection with the other sections in same chapter, as well as general rules on this subject, shall the county or State pay the tax fee of the Attorney-General?

The chapter commences in first section by giving salary of Attorney-General of the State, and then on to the end of the chapter is devoted to fees of District Attorneys. This is the special subject of the chapter. We then look again at its language. It first provides for payment of the district attorneys' fees, when the prosecutions and proceedings have been unsuccessful; second, or the money cannot be collected from the defendants, or the prosecutor is charged with the costs, the fees of the Attorney-General are paid out of the State or county treasury, as other costs are paid in criminal cases; costs in other criminal cases, or other costs in criminal cases, are provided for in Art. 2d, Title 8, especially from Sec. 5585 on the end of the article.

The above section provides for the State or county in which the offence was committed or is triable, paying costs in cases subsequently enumerated, Sub-Sec. 5, when the defendant has been convicted, but the execution issued has been returned *nulla bona*. Then follows section 5586, providing in what criminal prosecutions the State shall pay the costs, that is, in cases where the party is punishable with death or confinement in Penitentiary, and next section provides that similar costs in criminal prosecutions for offences punishable in any other way than specified in last section shall be paid by the county. Sections 5569–70 regulate the mode of verifying the bill of costs by the judge or court before whom the case was tried, and by District Attorney, and that a copy of the judgment and bill of costs (which is required to be entered of record in previous section),



certified by the clerk, and by Attorney-General and court, shall be presented to the Comptroller, Chairman of County Court or County Judge, as the case may be, and shall be paid to the clerk or other authorized person.

The motion in this case simply asked that the court perform this duty, which he refused to do, but held the county not liable at all. In this view we hold he was wrong. For proper costs the county was liable, and if the bill of costs was not correct in its items on examination, as required by Sec. 5569, then he should have corrected it and given judgment, or made the proper entry of the true amount and certified that, as required. Was five dollars the true amount? By Sec. 4545 it is provided, "In *no* case of misdemeanor, however, where the county pays the costs, shall the Attorney-General's tax fee be more than two dollars and fifty cents, as correctly argued for the Attorney-General, Wright."

The official delinquency, which is the basis of this civil proceeding, is a misdemeanor. Giving this section a fair construction we cannot avoid the conclusion that it must be held to apply in this case, and the true amount of fee shall be the \$2.50, as allowed or required by this section. The form of the proceeding, whether by indictment or motion in the nature of a civil proceeding, as this was held to be in Alston's case, cannot change the application of the section. It was a proceeding for a misdemeanor, the Legislature authorizing this civil proceeding as the form of the remedy in the particular case, but this does not change the essential nature of the offence for which the proceeding was prosecuted. This being so, we think it follows the correct fee should have been \$2.50 instead of \$5.00.

We here may remark, in closing this opinion, that we think the only real difficulty in the case grows out of the fact of the very large number of cases, and consequently large amount of costs to be taxed. Had it been only ten cases we hardly think any objections, such as are presented, as we have no doubt in great earnestness, by zeal of counsel, would ever have been thought of.

The question of the amount is one with which we have nothing to do; our duty but demands we shall fairly ascertain the law, and when this is settled it must take its course, results or consequences of laws being matters of legislative consideration, but not for us, so far as to swerve our judgments from the clearly ascertained path of duty; when this is seen we are but to follow

it and give our judgments in accord with the mandate of the law.

We do not deem it necessary to refer to other matters presented in the able argument filed with us for the county. The questions discussed we deem conclusive of the case. Judgment will be entered here in accordance with this opinion, we giving such judgment as the court below should have given.

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## HENRY KNOX *v.* THE STATE.

Jackson, April Term, 1877.

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1. **THE ATTORNEY-GENERAL'S FEE ONLY \$2.50—WHEN.**—Previous to the Act of 1875 the District Attorney General is allowed a fee of \$5.00 in misdemeanors where the costs were paid or secured by the defendants, but in no case where the county pays the costs in a misdemeanor was a fee of more than \$2.50 allowed. The Act of 1875 provided for defendants being compelled to work out the costs, when they failed otherwise to pay or secure them; by the 11th section it is provided, that the county shall pay all the costs in misdemeanor cases, as now, and the proceeds of said convict's labor shall be paid into the County Treasury. Though the Attorney-General be entitled to a fee of \$5.00, where the convict pays or secures the costs, and though the convict reimburses the county with the proceeds of his labor, and thereby indirectly pays the cost of his trial, yet the court hold, the Attorney-General is entitled to a fee of only \$2.50 under the partial provisions of Sec. 4515 of the Code, and the convict can not be compelled to "work out" any greater amount.

2. **THE CONVICT BOUND ONLY FOR STATE COSTS.**—Although the defendant be liable to judgment for his own costs, he cannot be held in custody until he pay or secure the same; he is only bound for costs on behalf of the State.

3. **CHAPTER 83 OF ACT OF 1875—VOID.**—The Act of 1875, Ch. 83, which provides that the convict be further held in the work-house, after working out the imprisonment affixed by the jury, and all the costs in the case to work out; "also all costs which may accrue after conviction for clothing and other necessities," considered by the court to be in violation of the 8th Sec. of the bill of rights, which declares that no man shall be taken or imprisoned, etc., or deprived of his liberty, but by the judgment of his peers or the law of the land; this chapter is held by the court to be void.—[Ed.]

**CASES CITED.**—Act of 1875, Sec. 11 and Ch. 83; Bill of rights, Sec. 8; State v. Wm. Stanton, 6 Cold.

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McFARLAND, J., DELIVERED THE OPINION OF THE COURT.

Henry Knox was convicted of a misdemeanor, and sentenced to serve a term at hard labor in the County Work-house, and

also until he shall have paid, secured or "worked out" according to law all costs in the cause in accordance with the Act of 1875, and the clerk was ordered to certify a copy of the judgment, with the bill of costs, to the Superintendent of the Workhouse. It is necessary that the bill of costs should be thus properly certified, in order to determine how long the defendant shall remain at labor in working out the costs, in case he fails to otherwise pay or secure the costs. The court gave certain directions to the clerk in making out this bill of costs, which were excepted to, and appealed from by the defendant.

1st. The court directed a fee of \$5.00 to be allowed to the Attorney-General.

Previous to the Act of 1875 the District Attorneys' General were allowed a fee of \$5.00 in misdemeanors, where the costs were paid or secured by the defendants, but in no case where the county pays the costs in a misdemeanor was a fee of more than \$2.50 allowed. The act of 1875 provided for defendants being compelled to work out the costs, when they fail to otherwise pay or secure them; by the 11th section it is enacted: "That the county shall pay all the costs in misdemeanor cases, as now, and the net proceeds of said convicts' labor shall be paid into the county treasury." So that in such cases the costs are paid directly by the county, as it formerly was, but the county may be reimbursed by the convicts' labor; so it is argued that in reality the convict pays the costs, and the Attorney General should have a fee of \$5.00. This argument is very plausible, but it is a case where the county pays the costs, as it previously did, and in such cases only \$2.50 is allowed by the partial provisions of section 4515 of the code. True, unless the convict should escape, die, or be unable to labor, the county may be reimbursed, but in this there is uncertainty; the county has this risk to run.

The act of 1875 does not, in terms, make any change in the fees of the Attorney General in such cases, and we are not disposed to add to the time that the convict must labor at 25 cents per day, in working out the costs.

Upon a doubtful construction we hold it to be clear that if the Attorney General can only receive \$2.50 from the county, that the convict should only "work out" that amount. So upon this we hold that the court below erred.

2nd. The Court directed that the defendant, in case he failed to pay the same, should be required to work out his own costs, that is, the costs of the Clerk and Sheriff for subpoenas and the attendance of his own witnesses. This we hold to be error. We

held recently at Nashville, that the security of a defendant for "fine and costs" was only bound for costs on behalf of the State. A defendant paying or securing the fine and costs on behalf of the State, (where there is no other punishment adjudged,) is entitled to his discharge. Although liable to judgment for his own costs, he cannot be held in custody until he pay or secure the same. The State, in one sense, has no interest in the payment of the defendant's costs. This was the law previous to the act of 1875, and this act only substituted labor in the work-house in lieu of paying or securing the costs, and only to the extent of the costs which the defendant was required to pay or secure in order to obtain his discharge; that is, the States' costs.

3rd. The action of the Court is complained of in another respect.

The Court added to the judgment, that the defendant be further held in the work-house, after working out the imprisonment affixed by the jury and all the costs in the case, to work out "also all costs which may accrue after conviction for clothing and other necessities provided for by the act of 1875, ch. 83, p. 117.

The 4th section of the act is, "That every person confined in a work-house for failing to pay or secure his fine and costs, or costs only, as the case may be, shall be credited at the rate of twenty-five cents per day, in addition to the jailor's fees, and no person shall be discharged from the work-house before said fine and costs, *"and the costs of all necessary clothing provided,"* have been fully paid as aforesaid, or the county judge so orders. Provided that no person shall be discharged except upon certificate of a physician that such person is unable to labor. It is argued that this provision is subject to great abuse, that the keeper of the work-house may, if he choose, continue to furnish the convict with clothing, to be worked for at 25 cents per day, and thus prolong his imprisonment almost indefinitely, and that there is no adequate provision to protect the convict from such impositions. We think this provision is seriously objectionable. The convict is required to work out the costs, including all jailor's fees accruing before *and after conviction*, and down to final discharge, but the costs and jailor's fees are fixed by law, and the convict is credited by twenty-five cents per day and jailor's fees. The time the convict is to labor in the work-house to pay the cost of his necessary clothing is not ascertained by the judgment of the court, nor is it fixed so that it may be rendered certain by any law of the land, it is to be determined only by the discretion of the superintendent of the work-house, or by his

agreement with the convict on the other hand. But it is not an objection by which we can declare the law void, that it is liable to abuse unless it violates some restriction of the constitution. Does it violate the 8th section of the bill of rights, which declares "that no man shall be taken or imprisoned, \* \* \* or deprived of his liberty but by the judgment of his peers, or the law of the land ?

We refer alone to such imprisonment as the convict may be compelled to undergo in working out the costs of clothing afterwards to be provided for him; would such imprisonment be by the judgment of his peers or the law of the land. The duration of such imprisonment is to be determined alone by the superintendent or keeper of the work-house, unless we suppose the convict may consent to it; how long the convict is to labor on this account the superintendent is to determine.

The law of the land, in this sense of the clause of the constitution, has been held to be equivalent meaning to "due process of law." A mere legislative act depriving a citizen of his liberty, is not in this sense the law of the land, unless it authorizes a proceeding wherein the party whose right is involved can have or is authorized to have a hearing and make defence. Says Mr. Webster, due process of law, or the law of the land, "is the general law which hears before it condemns, which proceeds upon inquiry, and renders judgment after trial." It is not enough that the law may be general in its application. "It is not," says Mr. Cooley, "the partial character of the rule so much as its arbitrary and unusual nature, which condemns it as unknown to the law of the land."

See the State vs. Wm. Staten, 6 Cold., where these authorities are quoted and approved and enlarged upon in the opinion of Judge Smith. Apply these principles to this case. Suppose, after the convict has been imprisoned a time sufficient to pay the costs in the case, the superintendent of the work-house assumes the right to hold him a still longer time to work out the cost of clothing furnished; and the convict denies this right, denies that the clothing has been furnished or received by him, denies the cost or value charged by the keeper. Where is his remedy? he has never had an opportunity to be heard upon these questions, no court has passed judgment upon these disputed facts. His keeper says the cost of necessary clothing furnished is \$10, and that the convict shall serve forty days, and to this imprisonment he is condemned without a hearing and condemned by a tribunal unknown to the law, and left without a remedy, except it be by

a writ of *habeas corpus*; but the constitution does not leave him to this remedy. He should be condemned first, and not first imprisoned and afterwards left to obtain his discharge, if not willing to submit. The remedy by writ of *habeas corpus* in such a case would be without the trial by jury, to which the defendant was entitled.

We are of the opinion that the objections to this feature of the law are of a grave character; that it seriously affects the constitutional rights of the citizens, and might often result in prolonged imprisonment and gross oppression, and we are therefore constrained to declare it void. We are aware that if no provision be made for clothing prisoners, that serious embarrassment will follow, but these considerations do not, in our opinion, meet the objections to the law we have pointed out.

These difficulties may, perhaps, be obviated by legislative action.

Judgment reversed.

### PHELPS, *et al.* v. MURRAY, *et al.*

Chancery Court at Nashville, April Term, 1877.

TO SUSTAIN A CONVEYANCE OF PROPERTY—NOT *IN ESSE*—WHAT NECESSARY.—To sustain a conveyance of property not *in esse* there must be a valuable consideration; it is therefore doubtful whether pre-existing debts will be sufficient. The contract must be one of which a court of equity would decree the specific performance, or the property, when it comes into *esse*, must be taken possession of by the grantee before adverse rights attach.—[Ed.]

CASES CITED.—Co. Litt. 265a; *Grantham v. Hawley*, Hob. 132; *Robinson v. Macdonell*, 5 M. & S. 228; *Bucknell v. Roiston*, Prec. in Ch. 238; *Curtis v. Auber*, 1 J. & W. 506; *Langton v. Horton*, 1 Hare 549; *Holroyd v. Marshall*, 2 De G. F. & J. 596; 10 H. L. Cases 191; *Congreve v. Evetts*, 10 Exch. 298; *Hope v. Hayley*, 5 Ellis & Bl. 830, 845; *Head v. Goodwin*, 37 Me. 182; *Blackmore v. Sheiby*, 8 Hum. 439; *Robinson v. Elliott*, 22 Wall. 523; *Mitchell v. Winslow*, 2 Sto. 630; *Wright v. Wright*, 1 Ves. 411; *Pennock v. Coe*, 23 How. 128; *Dunham v. Railway Company*, 1 Wall. 254; *Galveston R.R. v. Cowdrey*, 11 Wall. 459; *United States v. New Orleans R.R.*, 12 Wall. 362; *Clay v. E. T. & V. R.R. Co.*, 6 Heisk. 421; *Willink v. Morris Canal and Banking Company*, 3 Green Ch. 377; *Smithurst v. Edmunds*, 1 McCarter 408; *Butt v. Elliott*, 19 Wall. 544; *Cooper v. Apperson*, MS. opinion at Jackson; *Dalton v. Landahn*, 27 Mich. 529; *Brett v. Carter*, 3 Cent. L. J. 286; *Robinson v. Elliott*, 22 Wall.

313; *Edgell v. Hart*, 9 N. Y. 213; *Moody v. Wright*, 13 Met. 17; *Collins v. Meyers*, 16 Ohio 547; *Hickman v. Perrin*, 6 Cold. 135; *Tennessee National Bank v. Ebbert*, 2 South. Law Rev. 175.

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BEFORE HON. WM. F. COOPER, CHANCELLOR.

The complainants, as judgment creditors of the defendants, Murray & Regan, whose executions have been returned nothing found, seek by this bill to reach the interest of the judgment debtors in a stock of goods in their possession at the filing of the bill; but previously, and previous to the creation of the complainants' debt, conveyed by said debtors to the defendant Bradford, in trust, to secure debts owing by them to the defendants N. and G. Taylor. The conveyance includes some realty, and certain personalty described as follows: "Our entire stock of goods, and each and every article composing the same, now in our store, Nos. 19 and 21 North College street, Nashville, and any other goods which may from time to time, during the existence of this mortgage, be purchased by the grantors and put into said store to replace any part of said stock which may have been disposed of, or to increase or enlarge the stock now on hand." The debts secured were evidenced by notes having several months to run before maturity, and the condition of the deed was that the trust should be void, if the notes were paid as they became due; but otherwise the trustee might enter or sell. There were covenants by the grantors to keep up the stock to its condition at the date of the conveyance, and to apply "the profits arising from the sale" of the stock to the payment of the notes as they fell due. The bill insists that the deed is void on its face to the extent of the personalty included therein, and the demurrer squarely presents this question for decision.

The mortgage does fairly imply that the mortgagor is to remain in possession of the goods and sell them in an ordinary course of business, and does undertake to include goods to be thereafter acquired and brought into the stock. Two of the vexed questions of modern law are directly raised by the facts. There is a class of cases in which the reservation of a power of disposition by the mortgagor of property mortgaged, and the shaping of the mortgage so as to include after-acquired property, have been uniformly recognized as not inconsistent with the validity of the deed. There is another class of cases in which precisely the same provisions in substance have been held by some courts fatal to the conveyance, while other courts have been unable to see why any distinction should be made between

the two classes. The difficulty lies exactly at this point, and the solution must depend upon our being able to find some well-grounded legal principle which will reconcile the seeming conflict.

To constitute a valid sale at law the vendor must have a present property, either actual or potential, in the thing sold. Co. Litt. 265 *a*; *Grantham v. Hawley*, Hob. 132; *Robinson v. Macdonell*, 5 M. & S. 228. It was long in doubt how far equity would go in recognizing such contracts. In *Bucknell v. Roiston*, Prec. in Ch. 288; the supercargo of a ship, which was to go on a voyage to the East Indies, having shipped on board several goods and commodities, borrowed money of the plaintiff, and made him a bill of sale of the goods, "and of the produce and advantage that should be made thereof," in the nature of a security or pledge. The goods were sold on the voyage, and with the money others were bought, and these likewise were invested in other goods, "and so there had been several barters and exchanges of several sorts of goods." The supercargo died on the return voyage, and the defendant, his creditor, took out letters of administration on his estate, and secured possession of the goods. The plaintiff brought his bill to have an account and discovery of the goods, and satisfaction for the produce and advantage thereof. The Lord Chancellor, Lord Cowper, was of opinion that the trusts of the goods appeared upon the very face of the bill of sale, that the plaintiff was entitled to all the advantages consequential upon such trust, and might follow the goods for that purpose, so far as the produce could be traced, but no further, the residue to go in course of administration. In *Curtis v. Auber*, 1 J. & W. 506, Lord Eldon supported an assignment of the present and future earnings of a ship. And in *Langton v. Horton*, 1 Hare 549, the mortgage of a whale ship, her tackle and appurtenances, "and all oil and head matter, and other cargo which might be caught and brought home in the ship, on and from her then present voyage," was sustained against a judgment creditor of the mortgagor. "It is impossible to doubt," says V. C. Wigram in this case, in carefully guarded language, "for some purposes at least, that, by contract, an interest in a thing not in existence at the time of the contract may, in equity, become the property of a purchaser for value." That the law was far from settled on the subject, and the *ratio decidendi* still in doubt, will appear from the decision of Lord Campbell, as Lord Chancellor, in *Holroyd v. Marshall*, 2 De G. F. & J. 596. There, the conveyance in mortgage was of all the machinery.



implements, etc., in a schedule, with a proviso that all the machinery, implements, etc., which, during the continuance of the security, should be fixed or placed on the premises in addition to, or substitution for, the machinery, etc., specified in the schedule, should, during the continuance of the security, be subject to the trusts thereby declared. In a contest between the mortgagee and a judgment creditor of the mortgagor, Lord Campbell held that the latter had the better title to the machinery which had been added to, and substituted for, the machinery specified in the schedule. His reason was, that the mortgagee had acquired by the mortgage only an equity in the after-acquired property, which must give way to the legal right of a creditor, unless perfected by possession before the levy of the execution. This decision was reversed by the House of Lords, 10 H. L. Cases, 191, after two arguments, Lord Westbury, the then Lord Chancellor, delivering an opinion, the reasoning of which convinced his colleague, Lord Wensleydale, who had come to a different conclusion on the first argument, and has been deemed eminently clear and satisfactory by judges and text writers.

"The question," he says, "may be easily decided by the application of a few elementary principles long settled in courts of equity. In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, *provided the contract is one of which a court of equity will decree specific performance*. In the language of Lord Hardwicke, the vendor becomes a trustee for the vendee, *subject, of course, to the contract being one to be specifically performed*. And this is true, not only of contracts relating to real estate, but also of contracts relating to personal property, *provided the latter are such as a court of equity would direct to be specifically performed*." "There can be no doubt, therefore," he concludes, "that the mortgage deed amounted to a valid assignment in equity of the machinery and chattels in existence and upon the mill at the date of the contract." "It is alleged," he continues, "that this is not the effect of the contract, because it relates to machinery not existing at the time, but to be acquired, and fixed and placed in the mill at a future time. It is quite true that a deed, which professes to convey property which is not in existence at the time of a conveyance, is void at law, simply because there is nothing to convey. So in equity, a contract which engages to transfer property

not in existence can not operate as an immediate alienation, merely because there is nothing to transfer. But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. *This, of course, assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance.* If it be so, then, immediately upon the acquisition of the property described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract; for, if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained."

In this case attention was called by Lord Chelmsford to the fact that, although at law an assignment of a thing which has no existence, actual or potential, at the time of the execution of the deed is altogether void, yet, where future property is assigned and, after it comes into existence, possession is either delivered by the assignor or is allowed by him to be taken by the assignee, in either case there would be the *novus actus interveniens* of the maxim of Lord Bacon, and the property would pass. *Congreve v. Evetts*, 10 Exch. 298; *Hope v. Hayley*, 5 Ellis & Bl. 830, 845; *Head v. Goodwin*, 37 Me. 182.

The two points prominently brought out in this case with marked precision, and upon which the decision is made to rest, are, that the conveyance of property not in existence, upon a valuable consideration, will be good even at law, if the property be actually taken possession of by the conveyee under the contract before the right of third persons attach; and that such a conveyance will be good in equity without such previous possession, *provided the contract is one of that class of which a court of equity would decree the specific performance.* A contract relating to realty was always enforceable in equity, and, therefore, a conveyance of realty, not the present property of the vendor, is good in equity. *Blackmore v. Shelby*, 8 Hum. 439. It is by reason of overlooking these distinctions that the decisions have become, in the language of Mr. Justice Davis, irrecon-

cilable "by any process of reasoning, or on any principle of law." *Robinson v. Elliott*, 22 Wall. 523.

The leading American decision on these questions is that of Mr. Justice Story in *Mitchell v. Winslow*, 2 Sto. 630. That eminent judge, with his wonted boldness and wealth of learning, applied the doctrine subsequently enunciated in *Holroyd v. Marshall* in a nearly similar case—the mortgage, however, reserving to the mortgagors until default, not merely the power to use, but the power "to dispose of" the property mortgaged. The assignment could, he conceded, have no positive operation to transfer, *in præenti*, property in things not *in esse*; but, he added, "it operates by way of present contract, to take effect and attach to the things assigned, when and as soon as they come *in esse*; and it may be expressed as such a contract *in rem*, in equity." And he cites the decision of Lord Hardwicke in *Wright v. Wright*, 1 Ves. 411, probably the same alluded to by Lord Westbury, as expressly recognizing the doctrine. The great Chancellor there held that an assignment of a contingent interest or possibility of an inheritance was equally allowable with an assignment of a possibility of a personal thing or chattel real, and added: "An assignment always operates by way of agreement or contract, amounting, in the consideration of this court, to this—that one agrees with another to transfer and make good that right or interest, which is made good here by way of agreement." Mr. Justice Story pushed this doctrine to the full extent in the case before him, being of opinion that the power of disposition was not against public policy where it is "positively avowed and provided for" in the face of the deed. This point of the case was rather taken for granted than considered, and is one of the gravest doubt upon the character of contract then before the court.

To sustain a conveyance of property not *in esse*, there must be a valuable consideration; and it is, therefore, doubtful whether a pre-existing debt will be sufficient. The contract must be one of which a court of equity would decree the specific performance; or the property, when it comes into *esse*, must be taken possession of by the grantee before the adverse right attaches. The decisions which have kept these principles in view, as many of them have, are founded on the ancient landmarks and undoubtedly sound.

Upon these principles conveyances which simply extend the mortgage to after-acquired property, or which give a limited power of disposition of specific articles with a view to replace-

ment by similar articles, such as the machinery and tools of a manufacturing company or the rolling stock of a railroad, or which cover the return cargo of a ship freighted for foreign commerce, are unobjectionable. Conveyances of realty, of the produce of realty, of things of the nature of realty, or largely connected with realty, are within the rule, because enforceable in equity. Conveyances which, by reason of the importance of the subject-matter or of the purposes of the creation or uses of the subject-matter, involve the interests of the public, fall within the rule. The decisions are, I believe, uniform, that the mortgage of the road-bed, rolling stock, and other articles essential to the exercises of the franchises of a railroad, will be enforced in equity, although made to cover future additions and incomes to be earned, and with the reservation of a power to dispose of and replace certain articles. *Pennock v. Coe*, 23 How. 128; *Dunham v. Railway Company*, 1 Wall. 254; *Galveston R.R. v. Cowdrey*, 11 Wall. 459; *United States v. New Orleans R.R.*, 12 Wall. 362; *Clay v. E. T. & V. R.R. Co.*, 6 Heisk. 421. The reason is, that the public interest is involved in the enforcement of such contracts. The mortgage of a canal to raise money for its completion falls within the reason. *Willink v. Morris Canal and Banking Company*, 3 Green Ch. 377. An equitable mortgage of future additions to the furniture of a large hotel, as security for rent, is within the rule. *Smithurst v. Edmunds*, 1 McCarter 408. The mortgage of future crops, to secure the rent of land, is clearly good. *Butt v. Ellett*, 19 Wall. 544; *Cooper v. Apperson*, MS. opinion of Sup. C't. Tenn. at Jackson.

The conflict of the authorities is over the class of cases like the one before us, where, in a purely private transaction, a mortgage lien is sought to be created on personal goods, the only profitable use of which is as articles of commerce, and an unlimited power of disposition is reserved. Such a mortgage does not create an absolute lien on any property, but, as has been said, a fluctuating lien which opens to release that which is sold, and to take in what may be newly purchased. If the conveyee obtain actual possession of the articles which at any one time fall within the description, before seizure by adverse claims, the title to these articles becomes perfect under the conveyance treated as a power. *Dalton v. Landahn*, 27 Mich. 529. The doubt is where there has been no *novus actus interveniens*, and the rights of the parties must turn upon the validity of the contract. It is not valid at law as to after-acquired goods, that is clear. It is such a contract as a court of equity will enforce? In a

recent and well-considered case in the District Court of the United States for the District of Massachusetts, Lowell, J., has undertaken to answer this question in the affirmative. *Brett v. Carter*, 3 Cent. L. J. 286. It will be found, however, that most of the authorities cited and relied on by him range themselves under one or the other classes of cases clearly within the decision and reasoning of *Holroyd v. Marshall*. No English decision has gone any further, and the weight of American authority is undoubtedly against an extension to this particular class of cases. The Supreme Court of the United States has thrown the weight of its great authority in the negative. *Robinson v. Elliott*, 22 Wall. 513. The leading commercial State of the Union has ranged itself on the same side. *Edgell v. Hart*, 9 N. Y. 213. So has the State of Massachusetts, notwithstanding the lead of its ablest judicial son. *Moody v. Wright*, 13 Met. 17. So has the great western State of Ohio, in a masterly opinion. *Collins v. Meyers*, 16 Ohio 547. Our own Supreme Court has reached the same conclusion, expressly overruling *Hickman v. Perrin*, 6 Cold. 135, where the intimation was otherwise. *Tennessee National Bank v. Ebbert*, 2 South. Law Rev. 175.

The reason of the decisions against the validity of such deeds does not rest, as has been thought, on a presumption of fraud in conflict with the general rule that the question of fraud, arising out of the retention of possession by the grantor with power of disposition, is one of fact, to be determined by the circumstances of the particular case. It rests, principally, upon the ground that such a transaction, irrespective of fraud, is against public policy, throwing open too wide a door for possible fraud, and, *the contract does not fall within that class of which a court of equity will decree the specific performance.* The contract is invalid at law, and not enforceable in equity. The demurrer must be overruled.

R. McP. Smith, for complainants; Bradford & Henderson, for defendants.

THE STATE *v.* ALEXANDER FARRAR.

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Nashville, March 16, 1877.

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**OBSTRUCTING PUBLIC ROAD—INDICTMENT FOR.**—In an indictment for obstructing a public road it was alleged that the road was laid out by the County Court. Held by the court to be tantamount to the charge that it is a public highway.—[Ed.]

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DEADERICK, C. J., DELIVERED THE OPINION OF THE COURT.

The jury found the defendant guilty of obstructing a road in Coffee County, and on motion the court arrested the judgment, and Attorney-General appealed.

The ground upon which it is supposed the judgment was arrested is, that the indictment does not specify of what class the road obstructed was. The same section of the Code, which makes the obstruction of a public highway indictable, makes obstruction of a "private way" and "ways to burying places" indictable.—Sec. 1413, Sub-Sec. 4.

The indictment charges that the road obstructed was laid out by the County Court. This is tantamount to the charge that it is a public highway.

We think the court erred in arresting the judgment, and should have rendered judgment on the verdict of the jury.

It was stated in the argument by defendant's counsel that the Attorney-General had not signed the indictment, and on this ground the arrest of the judgment was affirmed, but it now appears otherwise—that judgment, if entered, will be vacated—and such judgment will be entered in this court as should have been rendered in the court below—that is, that defendant, Farrar, pay \$5 and the costs of this court and the court below.

## STATE v. ANTHONY.

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Jackson, May 26, 1877.

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**MAGISTRATES' FEES—FOR TAKING DOWN PROOF IN CRIMINAL CASES.**—Under Sec. 5062 of the Code, under the caption, "Proceedings before Committing Magistrates," it is enacted, "the evidence of witnesses examined shall be reduced to writing by the Magistrate, or under his direction, and signed by the witnesses respectively;" for such services Magistrates are allowed the same fee as prescribed by law for the taking of depositions.—[Ed.]

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FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

By the Code, Section 4550, after fixing the fees allowed Justices of the Peace in the cases specified, it is provided that "for any other service required by law in criminal cases the same fees are allowed by law in similar services in civil cases."

Taking down the testimony in criminal cases on preliminary examination by Justices is a service required of them by law in such cases; no fees are prescribed in this section of the Code; they must either be allowed no fees for this service (which is not to be presumed), or allowed "same fees as allowed in similar services in civil cases." The only services similar to this in civil cases performed by a Justice is the taking of depositions. The services in the one case are similar or like the other. It is the taking down in writing officially the testimony of a witness. It is true in this case it is not necessarily to be used as testimony in the criminal case, but in certain contingencies it may be so used. The uses to which the testimony may be applied, I do not think, furnish any guide to the determination of the question before us, but only the question as to whether the services are similar; if they are, then like fees are to be allowed as in civil cases for such similar or like character of services. It is provided that the services shall be identical in every particular, in order to make the fees in one case the same as in the other, but only shall be similar—that is, of like kind. I think the likeness in the services in the two cases is so clear, and in so many particulars, as sufficiently to fix the rate of the fees under the provisions of the Code cited to be the same, therefore the fees ought to be allowed.

CONCURRING OPINION, BY TURNEY, J.

By Section 5062 of Code, under the caption, "Proceedings before Committing Magistrate," is enacted: "The evidence of the witnesses examined shall be reduced to writing by the Magistrate, or under his direction, and signed by the witnesses respectively."

Section 4550, after fixing the fees allowed Justices in criminal cases, in certain specified items of service, by Sub-Section 8, enacts: "For any other service required by law in criminal cases the same fees allowed by law in similar services in civil cases."

By statute a fee of one dollar is allowed for the taking of a deposition by a Justice of the Peace or other authorized officer.

A deposition is the attested written testimony of a witness. The evidence committed in full substance to writing by the Magistrate, signed by the witnesses in criminal cases, comes within this definition.

The taxation is proper and will be certified.

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## THE STATE *v.* GREEN CHAIRS AND ALBERT M. NEAL.

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Jackson, June 9, 1877.

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PREVIOUS OPINION OF GRAND JUROR—DOES NOT DISQUALIFY—The foreman of the Grand Jury that found the indictment in this case was one of the committing Magistrates; such fact was pleaded in abatement to the indictment, urging the incompetency of the Grand Juror, upon the ground that he had prejudged the case. The Court say, "we do not understand that our laws require that the Grand Jurors shall be free from any previous opinion, as to the guilt of the accused."—[Ed.]

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McFARLAND, J., DELIVERED THE OPINION OF THE COURT.

The defendants to this indictment for larceny pleaded in abatement that the foreman of the Grand Jury that found the



indictment was not a competent and qualified grand juror because he was one of the Magistrates who heard the case upon a preliminary examination and committed the defendants to answer the charge, and that he had therefore prejudged the case. Upon demurrer this plea was held good, and the defendants discharged; the Attorney-General, on behalf of the State, has appealed.

It has been frequently held in this State that it may be shown by plea in abatement that grand jurors were not competent as that they were not freeholders or householders.—See cases cited, King's Dig. 4992, but we do not understand that our laws require that the grand jurors shall be free from any previous opinion as to the guilt of the accused. "Every male citizen who is a freeholder or householder and twenty-one years of age is legally qualified to act as a grand or petit juror, if not otherwise incompetent under the *express* provisions of this Code."—See Code, Sections 4002, 4002a. This is the language of the statute. Is there, then, any *express* provisions of the Code rendering a grand juror incompetent on account of a preconceived opinion? Sections 4003 and 4004 may, for the present purposes, be taken as applying to grand or petit jurors, but the qualifications there referred to do not apply to this case. Section 5085 is the only express provision other than the ~~above~~ disqualifying grand jurors, and that is in case the grand juror is himself charged with an indictable offence, or is prosecutor, or the offence is committed against his person or property, or he is connected by blood or marriage with the person charged; so it results by the positive provisions of Section 4002, if he is a male citizen, a freeholder or householder and twenty-one years of age, and does not come within the express provision of some other section of the Code, disqualifying him, he is legally qualified to act as a juror, and we have seen that in this case the juror does not come within the express provisions of any other disqualifying section of the Code.

The judgment will be reversed, the demurrer to the plea in abatement sustained, and the cause remanded.

WESTERN UNION TELEGRAPH CO. v. STATE OF TEN-  
NESSEE AND COUNTY OF SUMNER.

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Nashville, January 30, 1877.

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TELEGRAPH LINES—TAXABLE.—Telegraph lines are considered as partaking of the nature of realty, in analogy to the new doctrine that railroads and rolling stock are so treated, and consequently under the Act of March 24, 1875, such property is held by the Court liable to State and county tax.—[Ed.]

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FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

The only question in this case is, whether the line of telegraph owned by plaintiff, in error, is subject to State and county taxes as other property in the county of Sumner. The general question to be decided will be as to whether telegraph lines, as property, are now subject to taxation under our laws—this particular case being brought, as we understand, to test the question.

By the Constitution of 1870, Art. 2, Sec. 28, all property, real, personal or mixed, shall be taxed, but the Legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or private corporation purposes, and such as may be held for purely religious, charitable, scientific, literary or educational purposes; also \$1,000 worth of personal property in the hands of each taxpayer, etc. It is ordered all property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. By the Act of March 24, 1875, it is enacted, in pursuance of the imperative mandate to the Legislature, that all property shall be taxed, with the exceptions laid down in the Constitution specified. By the Constitution and this law all property, with the exceptions specified, shall be taxed; it is, however, to be taxed according to its value, that to be ascertained in such manner as the Legislature shall direct, so that the taxes shall be equal and uniform throughout the State.

The only question then is, does the system under which the value of our property is to be ascertained furnish the means of ascertaining the value of a telegraph line running through a county? if so, then its taxation follows, as a matter of course. It is property, it has a local situs, which may be readily ascertained, so far as the line is concerned, is affixed to the soil, and its cost and value may be readily ascertained, we think, with approximate certainty, sufficient for all the practical purposes of taxation; absolute certainty in value and equality, being a thing probably unattainable by any system.

We treat the telegraph line as partaking of the nature of realty, in analogy to the new settled doctrine that railroads and rolling-stock necessary to their use, running alone on their track, are so treated. We are aware that this is not strictly within the definition of realty, as found in the ancient common law, but those definitions were found in a ruder age than this, and must be accommodated to the advance of the age by sound analogies, as demanded by the exigencies of our diversified development, with this assumption we look to the Act of 1875, March 23d, providing for the assessment and collection of revenue to see if this property may fairly be assessed and its value ascertained for taxation. It is there provided for the election of a tax assessor to assess and list all the real estate in his county. He is, by the second section of the Act, to prepare a list of all taxable real estate in each civil district or ward of his county, and then select in each district, with taxable realty worth less than \$200 by last assessment, two respectable, prudent and discreet freeholders, residents therein, who, being sworn impartially to perform their duties, who, in connection with himself, are to assess and value all such property, and prepare a list of the same." Other provisions regulating the details of the proceeding need not be noticed.

We think it clear that all this may be done as to a telegraph line as well as any other property, locally situated in each civil district, including instruments, etc., attached to and making up a part of a complete line of telegraph fitted for use as such. We can see no need for the Legislature providing any special or arbitrary mode for ascertaining how such property shall be assessed, nor would it be proper to affix any arbitrary valuation upon it; its real value is to be ascertained as other property, and it taxed upon the same—in fact, to fix any arbitrary mode for assessing or ascertaining the value of property of the kind

would not be in accord with the spirit of the Constitution, or probably tending to make an arbitrary result not the real one—that is, the true value of the property, which is what was designed by the Constitution. The same principle applies to former modes of assessment before the Act of 1875, here referred, the particular mode of ascertaining the value by a general assessor and freeholders being the only essential difference. We think this the best solution of this question.

We cannot assume the Legislature have failed to obey the mandate of the Constitution—that all property shall be taxed—if what they have enacted may be made to reach the end designated. We think we have shown that our law may be strictly pursued, and this property operated with its fair share of the burdens of government. We find no exception in its favor; none, in fact, is authorized by the Constitution or by the Act of 1875. We do not feel called on to make one in favor of this corporation, unless compelled by law so to do. We think no such compulsion exists. This company, as others, pay a privilege tax on the privilege of telegraphing of 4 mills on the dollar on every \$100 in gross receipts by the Act of 1871; this, however, cannot affect the liability of the property owned by the company to taxation as property. The privilege is one thing, the property owned by the party having the privilege another, each of which may be taxed, the one as a privilege, the other as property, according to its value, as provided by the Constitution. We therefore conclude their property is subject to taxation as such; as to the privilege tax, we will not examine the liability of the company to its judgment, as it is not in question in this case; nor do we deem it necessary to examine the statute to see if the County Judge has pursued precisely the proper mode of assessing this property in this case; we settle the principle, and the details can be adjusted by counsel in the judgment.

Affirm the judgment.

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I do not concur. I think the Legislature has failed to take necessary steps to authorize the collection of the tax.

McFARLAND, J.

JOHN B. ANDERSON *vs.* C. E. REAVES, *et al.*

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Nashville, January Term, 1877.

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**BANKRUPTCY—DISCHARGE IN—MAY BE SET UP BY BILL IN CHANCERY AGAINST DECREE—WHEN.**—Bankruptcy proceedings having been instituted before final decree in the Court below, and suggestion thereof made, and the assignee made a party defendant, though the proceedings were not then stayed to await the decision of Court of Bankruptcy as to a discharge, but decree was afterwards rendered against the bankrupt without noticing the assignee, the bankrupt may, nevertheless, by bill in chancery, set up his discharge against said decree.—[ED. 4 L. 2, 418.]

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M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

This voluminous record presents a single question. The bill shows that a decree for money was rendered against complainant and others, in favor of C. E. Reaves, on the 2nd day of November, 1871, which was by appeal vacated and the cause removed to the Supreme Court. That afterwards, on the — day of December, 1871, the present complainant, Anderson, obtained his discharge in bankruptcy, which by this bill he prays to have set up as a discharge, the debt being one which was provable in bankruptcy. The record of the former cause shows that during its pendency the fact that proceedings in bankruptcy had been instituted by the present complainant, Anderson, was suggested and admitted of record, and by consent the cause was revived against his assignee, but no further notice was taken of the assignee, and the final decree was rendered against Anderson. The discharge having been subsequently obtained, is sought to be set up by this bill.

We have held that when the discharge is obtained after the decree in the court below, and while the cause is pending in this court, that it may be set up by bill in chancery after decree in this court. That the question of discharge should be made in this mode, and not by suggestion of the fact in this Court.

The only question then is, whether this is changed by the fact that the bankruptcy proceedings were instituted before the decree in the court below, and that this fact was suggested in the cause, and the cause then revived against the assignee. Application might have been made in the court below to stay proceedings until action could be had upon the question of discharge; but as

this was not done, the question is whether the party is to be thereby deprived of the benefit of his discharge.

We think not. See *Bump on Bankruptcy*, p. 600. Where the bankrupt fails to plead a discharge which he has already obtained, the judgment against him, will not be disturbed. The decree of the Chancellor sustaining a demurrer, will be reversed, and the cause remanded to be proceeded with, the defendant paying the costs of this court.

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ELVIRA A. CRAWFORD *v.* ÆTNA INS. CO.,

AND

ELVIRA A. CRAWFORD *v.* MANHATTAN INS. CO.

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**Jackson, April Term, 1877.**

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1. **INSURANCE—CONTRACTS OF INSURANCE NOT ABROGATED—WHEN.**—Contracts of insurance are not abrogated by reason of failure to pay premiums, when such failure was consequent upon the war.

2. **WHERE POLICY-HOLDER DIES DURING THE WAR—RIGHTS OF HIS REPRESENTATIVES.**—When the policy-holder, in such cases, dies during the war, his representatives are entitled to the value of a paid-up policy on the day the premium was first omitted to be paid, with interest.

3. **PROCLAMATION OF THE PRESIDENT—DID NOT DO AWAY WITH ENEMY RELATION OF THE PARTIES.**—The proclamation of the President of August 18th, 1861, and March 31st, 1863, did not do away with the enemy relation of the parties. By the Act of Secession and the declaration of war they had already become citizens of opposing powers or governments; their contracts had been suspended.—*Ed.*

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TURNEY, J., DELIVERED THE OPINION OF THE COURT.

The complainant was the wife of Erasmus S. Crawford, who died Feb. 7, 1865. On June 18, 1856, the Ætna Ins. Co. issued a policy of insurance to complainant, upon the life of her husband, for the consideration of the annual premium of one hundred and ninety-two dollars, the sum of assurance being six thousand dollars. At that time the husband was about forty years of age.

The premiums were regularly paid up to and including the one falling due June 18, 1861.

On October 19, 1857, a similar policy was obtained from the Manhattan Ins. Co. for the sum of four thousand dollars, at the annual premium of one hundred and thirty-five 66-100 dollars.

The premiums were paid up to and including that falling due October 19, 1860.

At the time of the issuance of the policies complainant was a citizen of Vicksburg, Miss., but in 1859 she removed with her husband to Memphis, Tenn., where he remained until his death, and where complainant still lives.

During the whole time the Insurance Company first named was an institution in Connecticut, and the second in New York.

After the close of the war demands were made upon the defendants respectively for the amounts of the insurance, which were refused, and these bills were filed, the first on April 2, and the second on October 19, 1872, asking that defendants be required to pay the full insurance, or (if that cannot be granted,) the amounts of the premiums paid, with interest, and for general relief.

To each of the bills there is a demurrer, which was overruled by the Chancellor.

Complainant, for whose sole and separate use the policies were taken, insists she is entitled to the full amounts, with interest. The defendants insist she is entitled to nothing, or if to any thing, only to the equitable value of the policies at the time of the death. The questions arise for the first time in Tennessee.

We are furnished with several State, and some Federal authorities, in which there is a decided conflict of opinion, even the decisions of the Supreme Court of the United States not being uniform.

For complainant it is insisted she was relieved from the regular payment of the premiums after the breaking out of the war, the parties bearing to each other the relation of enemies, by reason whereof the contracts were suspended and the stipulations in the policies making them void for a failure to pay on or before the day, made unavailable for the defendants. That the insured dying, the war flagrant, the liability of defendants was fixed.

On the other hand, it is insisted the failure to pay at the day renders the policies void, and forfeited to the companies the premiums already paid, unless perhaps to the extent of the equitable value of the policies at the time as already indicated. Defendants claim that the proclamation of the President of August 18th,

1861, declaring certain States, except such parts as may maintain a loyal adhesion to the Union and Constitution, or may be from time to time occupied and controlled by forces of the United States, in a state of insurrection, and inhibiting all commercial intercourse between the inhabitants thereof with the exceptions aforesaid, and the citizens of the other States, etc., relieved the parties of the enemy relation, so far as to give to complainant the right and make it her duty (if the contract was merely suspended) to pay the premiums falling due between the date of this proclamation and that of March 31, 1863, revoking the exceptions of the first and having failed to do so, the policies and paid up premiums were forfeited by the terms of the contracts of insurance.

Returning to the other propositions, we find highly respectable authorities each way, and so can only be materially benefited by their reasoning. The safe rule, as well as the most equitable one, seems to be to place the parties as nearly in *statu quo* as possible.

The contracts of insurance were suspended by the war, and before its close made impossible of revivor by the act of God, and not by the acts or negligences of the parties; they were entirely free from fault. Both, so far as we can see, intended to carry out in good faith their respective undertakings, and were prevented by means not their own, and entirely without their control.

By the contracts and the payment of the first premiums, the complainant purchased the right not defeasible by the defendants and without regard to the changed condition of health or age of the insured, of keeping the insurance alive for the stipulated annual premiums, and it was the duty of the defendants to abide the contract, and receive the premiums. These obligations were observed and performed as long as it was possible to the parties; under this condition of their surroundings, what are the equities of the parties? We do not think the defendants are entitled to retain the full amounts of the premiums paid, but they are entitled to compensations for the risks during the years the policies were not suspended, and we can conceive no better rule for the ascertainment, than to hold as we do, that complainant is entitled to the value of paid-up policies on the days the premiums were first omitted to be paid, with interest. The causes are referred to the Clerk of this Court to ascertain and report such amounts.



The proclamation of the President did not do away with the enemy relations of the parties. By the act of secession and the declaration of war, they had already become citizens of opposing belligerent powers or governments; their contracts had been suspended. Agents of the defendants had been withdrawn from the seceding States, and if they had not been, by the laws of this State as holden by this Court, the war absolutely vacated their powers to act as agents. The defendants gave no notice of the falling due of premiums according to their universal custom in such cases, nor did they make any effort to collect. Besides, the proclamation was not definite as to the direction of the privileges allowed by it. Its continuance was necessarily uncertain, by reason of the fluctuating fortunes of war, and if unaffected by these, it was at the will of the President revocable, and was revoked more than two years before hostilities ceased by the proclamation of March, 1863, prohibiting all commercial intercourse between the States inhabited by the parties respectively.

The proclamation of the President must be confined to its intended and legitimate objects, that is, to the transactions having their inception after its issuance, and to be continued until such time as the President saw proper to put an end to them.

The proclamation was meant to cover and protect such commercial intercourse as would in some way promote the public welfare, and not to revive contracts abstractly and exclusively individual, made before the separation of the States, and the war consequent thereon. The parties to contracts like these must be governed and controlled by fixed law, and not by the simple will of the executive acting each day upon his conviction of what is best for the government he represents in times of a most stupendous war, the events of to-day suggesting one course, those of to-morrow the opposite.

A little reflection points out the utter confusion and contradictions and insuperable difficulties that would result from a rule different to the one we indicate.

The decree is affirmed, with the order of reference suggested.

A. G. CAMPBELL, *et als.*, v. ZACK. BRYANT, *et als.*

Jackson, November 3, 1876.

1. DECREES AND JUDGMENTS OF COURTS CAN BE ATTACKED COLLATERALLY—WHEN.—If the decree of a Court for the sale of land be void for failure to show upon its face authority in the Court to make such decree, a collateral attack may be made against the decree to avoid the sale, but the *evidence* which guided the Court rendering the decree, cannot be looked to in such a proceeding.

CASES CITED—Freeman on Judgments, §135 and 724, also Kendle and Titus, MS. Jackson, April term, 1872.

2. BILLS TO ADMINISTER INSOLVENT ESTATES—MUST BE FILED—WHEN.—A bill to administer an insolvent estate must be filed *after* the suggestion of insolvency is made according to law. Code, 2366; also 2381.

3. A BILL TO SELL LAND—DEFECTIVE—WHEN.—A bill for an administrator to sell lands to pay debts is defective, in failing to allege the exhaustion of personal assets, and not setting forth any particular debts as remaining due and unpaid.

4. PURCHASE MONEY UNDER VOID SALES—LIEN ON LAND—WHEN.—Where a sale of land is decreed to an administrator to pay debts which are a charge upon the estate, and said sale is held to be void in a suit by the heirs contesting its validity, the complainants in such litigation must account for all money paid by the purchasers which was appropriated to the discharge of *bona fide* debts, and so much of the purchase money as can be shown to have been thus appropriated, will be declared a lien on the land.

CASES CITED—2 Hols., 389; 1 Cold., 524; 2 Sneed, 470-1.

PURCHASERS UNDER VOID SALE—ENTITLED TO WIDOW'S DOWER—WHEN.—In case of a void sale under a decree to an administrator where the widow accepts part of the purchase money as value of her dower, such purchasers will be entitled to have the dower laid off to them, and title vested in them in proportion to the amount paid by each as tenants in common.—ED.

FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

This bill is filed by the heirs at law of George Peoples, deceased, to have a sale of land made under a decree of the Chancery Court at Huntingdon declared void, and the purchasers claim under said sale, removed as a cloud on complainants' title. The Chancellor so decreed, from which defendants, the purchasers, and heirs of one who had died, have appealed to this Court.

Numerous irregularities and errors in the proceedings for said sale are charged in complainants' bill which need not be noticed. Mere irregularities, and even errors, for which the case might have been reversed in a direct proceeding by appeal or writ of error, cannot be noticed in a collateral attack, as this is. It is now settled beyond question, and has long been the established law both in this State and elsewhere, that if the Court rendering

a judgment or decree has jurisdiction of the subject matter and of the parties decreed against, the judgment or decree is valid, when collaterally brought in question, these facts appearing on the face of the pleadings and decree. See Freeman on Judgments, Sections 135 and 724, and this question must be tested by the record in such cases, except in case of an attack on the judgment or decree for fraud in obtaining it. See case of *Kendle v. Titus, et. als.*, MS., Jackson, April term, 1872, for a review of the authorities on this question.

The rule laid down in the last cited case is, that if the pleadings and decree assume a state of facts on which the Court is authorized to make the decree the sale made under it is valid, otherwise the decree made is void, in cases like this, but that you cannot look to the evidence before the Court, on which the decree was based, to see whether the Court drew the proper conclusion from it or not. This rule stands on the soundest principle, one which cannot be departed from, otherwise we would have one Chancery or Circuit Court reviewing the decisions and judgments of sister Courts of co-ordinate jurisdiction because erroneously decided. No such incongruity could be sustained; an appellate tribunal must do this.

We proceed to test the validity of the sale sought to be set aside by these rules, and look to the original bill filed by Hutchison, the administrator of Peoples, and the decree of sale to see whether the Court had jurisdiction to make the sale, assuming for the present that the persons interested in the land were properly made parties to the proceeding.

The original bill is made an exhibit to the present, so that we can see all its obligations. It is very brief, and its defects readily seen. It is filed by Hutchison, claiming to be administrator of George Peoples, deceased, against the administrator and heirs of said Peoples, states his death in the State of Arkansas, that he was seized of the lands now in controversy, situated in the county of Carroll, in which his widow was entitled to dower, but that she preferred to take the same in money; the land is stated to be between 600 and 700 acres; that this was *nearly* all the property said Peoples had in Tennessee, and was worth from four to six thousand dollars. It is then alleged that Peoples was "greatly embarrassed in Tennessee at the time of his death, even to insolvency, and the complainant here suggests the same in your honorable Court," and prays that his creditors, when ascertained, may be made parties to this bill, and notice be given them to file their claims, so that the estate can

be wound up in this court. Then follows a prayer for publication as to the heirs and creditors, and for the sale of the land. This cannot be held to be a bill to administer an insolvent estate, under our laws, for that purpose, for such a bill can only be filed "after the suggestion of the insolvency of the estate," or, to use the language of the Code, the bill may be filed at any time after the estate is reported insolvent to the County Court, Sec. 2366; see also Sec. 2381. We find no authority to do so before, the authority being by statute, the statute must be looked to for its exercise. It is obvious from this that the suggestion of the insolvency to Chancery Court must be treated as a nullity. It might as well have been stated it had been made in the Circuit Court or before a Justice of the Peace; no authority is given for making such suggestion to the Chancery Court. This cannot be treated, then, as an insolvent bill under the Code. It is equally clear that as a bill to sell land for payment of debts it is fatally defective; it does not allege the exhaustion of the personal assets in the payment of debts, nor does it set forth any particular debts as remaining due, with other defects not necessary to be noticed.

In addition to the above, the decree ordering the sale of the land fails to find or assume facts that would authorize a sale of the land. The Clerk and Master was ordered to make a report showing what assets had come to the hands of the administrator, and the amount of indebtedness, whether the administrator had exhausted the assets in payment of debts and the necessity for the sale of land. He submitted his report, based on the deposition of the administrator alone, which report and deposition are embodied in the decree ordering the sale, and made the basis for the decree by the Court. We can look to the facts thus embodied in the decree to see the grounds on which the sale was made. It appears from this decree that no debts had been paid, but the administrator had assets to the amount of \$1,000 in his hands. It further appears that no account is taken of any indebtedness, but the administrator says *he knew* of claims against the estate to the amount of about \$7,631, and did not know that this was all. This is the sole fact to be found in the decree on which the order of sale was made; only a temporary statement from the administrator; that he had heard or knew of claims to the amount specified against the estate; no assumption that this fact was made to appear to the Court in any other way than as above. We need but say that a sale based on such a decree is

void for want of showing on its face any authority in the court to make it.

We need not cite other cases in support of this conclusion. The Chancellor properly so held, and set aside the sale, and we affirm his decree in this reference. But under the principle of the case of *Martin, et als., v. Turner, et als.*, 2 Heisk. 389; see also 1 Cold. 524; 2 Sneed 470-1, the complainants must account for all money paid by the purchasers, which was appropriated to the payment and discharge of *bona fide* debts, which were a charge on the land as assets under our law. So much of the purchase money as can be shown to have been thus appropriated will be declared a lien on the lands on which it was paid in favor of the purchasers, in proportion to the amount paid by said purchaser, and the debts discharged by the same; an account of such debts and payments by the purchasers will be taken in the court below, and proper orders made in accordance with this view.

One other question remains in this case. It appears that the widow had accepted the \$1,448 of the purchase money paid into court, as value of her dower. She is not a party to this proceeding. The chancellor permitted the purchasers to elect whether they would take the dower to be laid off by metes and bounds, or to receive this sum with interest from the time paid to the widow. The defendants elected to take the money, and a lien was declared in favor of the purchasers in proportion to their payments for this sum on the entire land purchased.

We are unable to see any sound principle on which this part of the decree can stand. The purchasers get a good title to this dower interest. The widow cannot disturb them in the enjoyment of it during her natural life. The complainants cannot fairly be compelled by this means to purchase and pay for the dower interest. We therefore reverse the decree as to dower, and direct that it be laid off to the purchasers of the land by metes and bounds, and title vested in the purchasers in proportion to the amount paid by each as tenants in common; no account of rents of dower interest will be taken as a matter of course.

This disposes of all the questions we deem material to notice in this case. It will be remanded to the Chancery Court to be proceeded in under this opinion. Costs of this court will be paid, one-half by the complainants, the other by defendants, who are free from disability.

JAMES STOVALL, (*col'd*) v. THE STATE, FOR USE, ETC.

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Nashville, January Term, 1877.

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BASTARDY—DEFENDANT NOT ENTITLED TO THE BENEFIT OF REASONABLE DOUBT.—Bastardy cases are in the nature of civil redress, although the form of enforcing the remedy is by a State proceeding; notwithstanding this fact the defendant is not entitled to the benefit of the doctrine of reasonable doubt, applicable in criminal cases.—[ED.]

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M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

This is a bastardy proceeding. The proof is disgusting in its details, and very conflicting; but the jury have settled the conflict, and we bow to their superior wisdom in questions of this character.

The only question is, whether the court was correct in holding that the defendant was not entitled to the benefit of the doctrine of reasonable doubt, applicable in criminal cases.

The proceeding is in the name of the State, but in the language of Judge Caruthers, delivering the opinion of the Court, in the case of *James O'Neal vs. The State*, 2 Sneed: "These contests are in their nature under our laws, between the mother and the reputed father of the unfortunate bastard, for the support of the fruit of their mutual crime." And in that case it was held that under the statute giving to either party the right to appeal, the mother might appeal, although in the record she was not a party.

We may add, that the effect of a judgment against the defendant is not to punish him for the commission of a crime, but to compel him to pay the necessary sums to aid the mother to support the child, and to prevent it becoming a county charge. It is in the nature of civil redress, although the form of enforcing the remedy is by a State proceeding, and the judgment is enforced by imprisonment.

The affidavit of the mother is conclusive, and makes out the case without more, unless the defendant, upon oath, deny his guilt in the form prescribed by the statute.

We think when the issue is made up, it is to be determined by the weight of proof as in civil cases.

Affirm the judgment.

**SAMUEL MAYNARD v. THE STATE.**

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**Jackson, June 9, 1877.**

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**SHERIFFS IN CHARGE OF JURY—OATH OF.**—Sheriffs and Deputy Sheriffs must have the special oath administered to them when in charge of jury. The law makes no distinction in favor of Sheriffs, as against constables and other officers.—Ed.

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**TURNER, J., DELIVERED THE OPINION OF THE COURT.**

On the 21st of February, 1877, the jury was placed in charge of J. F. Smith, Deputy Sheriff, "who was sworn to keep them together and separate and apart from all other citizens." This oath is not as required by law, as held in *Duncan v. The State*, and several subsequent cases. It is insisted, however, that the Deputy Sheriff was an officer of the Court, and no special oath was necessary for him.

The law makes no distinction in favor of Sheriff, as against constables or other officers, and we can make none.

There is nothing in the office or oath of office to authorize the distinction contended for, and we can see no reason why the same bad results may not flow from a failure to impose the same strict, sworn statement upon a Sheriff or Deputy as upon another to whose charge a jury may be committed.

We are not prepared to subscribe to the doctrine of the *Louisiana* and *Virginia* cases on this question, nor do we know the statutes and rules of practice in those statutes as to the powers and duties of Sheriffs and the care of juries in criminal cases.

The venue is proven neither directly nor circumstantially.

Reverse the judgment.

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**JOHN MOSES v. THE STATE.**

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**Jackson, May 19, 1877.**

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**COPY OF INDICTMENT—PRISONER ENTITLED TO—IN ALL CASES—NOT RESTRICTED TO CAPITAL CASES.**—Prisoners in actual confinement are entitled to a copy

of the indictment in all criminal prosecutions; this right is not restricted, as would be inferred from Sec. 5209 of the Code, to capital offences. The prisoner can waive the right, and if he does not demand it, such waiver will be implied.—[ED.]

CASE CITED.—Nokes v. The State.

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SNEED, J., DELIVERED THE OPINION OF THE COURT.

The prisoner appeals in error from a conviction of mayhem. The indictment was found against him on the 9th of March, 1877, and he was put upon his trial on the 13th of March, 1877, and was in jail from the period of his arrest until the termination of his trial, except during the progress thereof, when he was in the custody of the Sheriff. Before his trial was commenced he demanded a copy of the indictment against him, which was refused. This was error. "In all criminal prosecutions the accused hath the right to demand the nature and cause of the accusation against him, and to have a copy thereof."—Const. Tenn., Art. I, Sec. 9. To give effect to this provision of the organic law the statute provides that "every person indicted for a capital offence, if he is in actual confinement, is entitled to a copy of the indictment at least two entire days before trial."—Code of Tenn., Sec. 5209. In the opinion of the Court there is no authority for the restriction of this constitutional right to capital cases. It applies alike to all criminal prosecutions. The prisoner has a right to waive the right, and if he does not demand it such waiver will be implied, but when demanded it is error to refuse it.—Nokes v. The State, 6 Cold. 296.

Let the judgment be reversed.



## General Legal Information.

### ABSTRACT OF DECISIONS OF THE SUPREME COURT OF TENNESSEE.

[From advance sheets of 9 Heiskell's Reports.]

**LIFE INSURANCE — EVIDENCE — WARRANTIES.**—1. In a suit upon a wife's policy on the life of her husband, the latter's declarations, made after the delivery of the policy, are inadmissible. 2. False answers by the insured to the questions in the application, will not be held to the strictness of warranties, if they relate to matters not material to the risk assumed. Opinion by McFarland, J.—*Southern Life Ins. Co., v. Booker*, p. 706.

**CONTRACT — INSTRUCTIONS.**—The Court should have told the jury the legal effect upon the rights and obligations of the parties in the event the offer referred to in the contract was an annual guaranty of the sum of \$7,000; and not a partnership of an estimated profit of \$7,000 or \$8,000 *per annum*, as alleged in the declaration. If the former, it devolved upon the plaintiff to establish the amount due him, by showing the difference between the annual sum promised by the business of Douglass and the offer of \$7,000, not to exceed \$3,000 for the three years. If the latter, then by showing the difference in the profits of the business of the two firms for the three years.—Ib. 69.

**PROPOSITIONS—DIFFERENCE — ASCERTAINMENT.**—The difference in the offers must be ascertained from the estimates made by witnesses, with the terms of the respective offers

before them, based upon their knowledge of the past business of the house or houses, and the characters of the members of the firm or firms, as the case may be, for skill, energy and success in business.—Ib. 69.

**CONVERSION.**—1. **TROVER.**—A conversion, in the sense of the law of trover, consists either in the appropriation of another's property to one's own use, or in its destruction, or in exercising dominion over it in defiance of the owner's right, or in withholding possession from him under an adverse claim of title.—*Rouch v. Turk*, p. 708.

2. **SALE—FACTOR — PRINCIPAL.**—The mere act of selling goods, obtained from an unauthorized agent, with no knowledge of the principal's title, will not render a factor liable for a conversion.—Ib. p. 708.

3. **DEMAND—NOTICE.**—To make the factor liable, a demand must be made while the goods, or their proceeds, are in his hands; or notice of the owner's title, or want of title in the party from whom they are received, must be brought home to him; and thus fix upon him a wrongful assertion of dominion over them, in defiance of the owner's right.—Ib. p. 708.

4. **SLAVE—LIFE ESTATE — JOINT INTEREST.**—A person who has a life estate, or joint interest, in a slave, can maintain the action of trover for his conversion.—*Logan v. Hartford Coal Co.*, p. 689.

**CORPORATION.—1. PRIVATE — INTERPRETATION — GARNISHMENT — “PERSONS” — “CORPORATIONS.”**—The Code gives the remedy by garnishment to all persons, and defines “persons” to include “corporations”—but the term “corporations,” as here used, implies private, and not public or municipal corporations.—*City of Memphis v. State*, p. 511.

**2. STATE — CHARTER — GRANT.**—All legitimate grants and rights asserted against the State, must be clearly defined, and not implied. If a charter is silent about a power, it does not exist.—*Gayoso Gas Co. v. Williamson*, p. 314.

**3. MEMPHIS GAS LIGHT CO.**—It was not the intention of the Legislature, in the Acts incorporating this Company, to confer the exclusive right to manufacture gas in that city.—*Ib.* p. 314.

**4. POWERS.**—A corporation is the creature of the law, and possesses no authority or powers except such as are expressly enumerated in its charter, or as are necessarily implied.—*City of Memphis v. Gayoso Gas Co.*, p. 531.

**5. LEGITIMATE AIM—INDIVIDUAL.**—To attain its legitimate aim, a corporation may deal precisely as an individual, who seeks to accomplish the same end.—*Ib.* p. 531.

**6. MEMPHIS.**—The corporation of Memphis had the power to procure a supply of gas by subscribing for stock in a gas company.—*Ib.* p. 531.

**7. AGENT—RATIFICATION.**—If a corporation, or its agent, perform an act or make a promise that is forbidden by its charter, or that is not expressly or by fair implication authorized thereby, such act or promise is a nullity, and cannot be made valid by subsequent ratification.—*Ib.* 531.

**8. ACT—PROMISE.**—But if the corporation have the power, either by express grant, or by fair implication, to do the act or make the promise, and it is done or made defectively, then a subsequent ratification will make it valid.—*Ib.* p. 531.

**9. PROPOSITION — ACCEPTANCE.**—To show that an agent was authorized to accept a proposition, and if not, that the corporation afterward ratified his acceptance, it was competent to prove such circumstances as would enable the jury to determine whether the offer was accepted or ratified.—*Ib.* p. 531.

**10. SEAL—EVIDENCE.**—The seal of a corporation to an instrument is *prima facie* evidence that it was placed there by the proper authority—and it raises the presumption that the instrument is the act of the corporation.—*City of Memphis v. Adams*, p. 518.

**11. COUNSEL—FOREIGN STATE.**—In the absence of express power in its charter, a corporation may, through its trustees, employ counsel to attend to its interest in another State; such a power is essential to its existence, and is inherent in it.—*Ib.* 518.

**12. TRUST.**—But this power can be legitimately exercised only in regard to matters which pertain to the trust created by the act of incorporation. And whatever powers are requisite to the faithful execution of this trust, are necessary incidents to the powers expressly delegated.—*Ib.* p. 518.

**13. SUIT — DIRECTORS — STOCK-HOLDERS.**—To authorize a stockholder to institute a suit in his own behalf, the refusal of the Board of Directors must amount to a clear default, involving a breach of duty.—*Gayoso Gas Co. v. Williamson*, p. 314.

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J. N. OLIVER *et al.* v. W. McLEAN *et al.*

Jackson, May 12, 1877.

1. EVIDENCE.—WHETHER CLAIMS TAKEN BY CREDITORS ARE RECEIVED AS SECURITY OR IN SATISFACTION OF THE DEBT, IS A QUESTION OF FACT.—When a creditor takes notes or claims from his debtors, the question whether such claims were taken as a security simply, or accepted in absolute satisfaction of the debt, is one of fact.

2. ARGUENDO.—MISREPRESENTATION OF FACTS.—GROUND FOR RELIEF IN EQUITY.—WHEN.—A misrepresentation of facts, whether with or without knowledge of their falsity, upon which a party is induced to act, is as conclusive a ground in equity for relief as an assertion willfully false.

3. ARGUENDO.—MISREPRESENTATIONS.—WHERE SUBJECT OPEN TO BOTH PARTIES.—NOT FRAUD.—WHEN.—In a transaction where the subject is equally open to both parties, neither party is presumed to trust the other, but to rely on his own judgment, and if it be a matter of law it does not constitute fraud, because the law is presumed to be equally in the knowledge of both parties, where the facts are known and there is no special confidence or trust violated.

CASES CITED.—1 Sneed, 514; Hels. Dig., 483 and 488; Blease v. Garlington, 2 Otto, 9; Smith v. Click, 4 Hump. 186.

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FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

The bill filed in this case is to enforce collection of a balance claimed to be due complainant by defendant McLean, as one of the firm of Lloyd & McLean.

The first question to be determined is whether a claim known in the record as the "Zephyr Claim," for \$2,193.05 was transferred to complainant as an absolute payment, or only as a collateral, to be credited on complainant's debt when collected. It is alleged in complainants' bill that it was transferred as collateral only, and an exhibit of the instrument by which it was transferred is made as evidence of this fact. How this is, is the first issue made between the parties. Defendants say that the assignment was not made as a collateral, but taken as absolute payment or credit on the debt due complainants. If defendants are correct, then McLean owes complainant nothing, and the bill fails, so that other questions need not be considered.

The proof on this question is substantially as follows: In 1867, when the assignment was made, Lloyd & McClean, who had been doing business in the way of supplying steamboats, were considerably indebted, much pressed, if not unable to meet their engagements. They were indebted to Oliver & Co. over three thousand dollars, which was being pressed for payment. In fact it is evident Oliver & Co. were uneasy, and with good cause, as to the prospects of realizing their debt. McDonough, another creditor of Lloyd & McLean, was also pressing them for payment, and was anxious to get the claim against the steamer Zephyr and her owners, which was then in suit in the common law court of Memphis. Under these circumstances McClean & Lloyd went to Oliver & Co. and stated to them the facts in reference to the claim in suit, and proposed to let them have it in preference to McDonough, probably on the ground that their, (O. & Co.'s), debt was the oldest, at any rate one they preferred to pay. It is probable that McLean & Lloyd stated that McDonough was about to attach the claim, and that they would be closed up, as Oliver swears that he went with "break-neck speed," to use his own language, to get the assignment completed so as to secure the claim before McDonough. McLean stated, no doubt, that the claim was good, and was a lien on the boat, because based on supplies furnished the boat. It is clear both parties so under-

stood the matter. Oliver says he took it for granted that the claim was a lien, "as I had always understood supplies were a lien in such cases," he adds, however, "I might have been a little too smart and thought I knew it all." Oliver, however, insists that the agreement was, that the claim was only to be taken as collateral, and be a credit or payment in the event it was collected, or to the extent realized on it. McLean, however, is equally explicit in swearing that it was taken as an absolute payment, and with no conditions whatever. In this he is corroborated by Lloyd who was present at the time, and who tells a very frank story about the whole matter, and says the precise terms of their contract, as he understood it, was put into the paper transferring the claim. He also adds a circumstance favoring his view, which is, that McDonough was eager to take the claim at its par value, all parties supposing the claim good and a lien on the boat.

Assuming the matter pretty equally balanced between the parties thus far, we turn to the written assignment made at the time, as certainly furnishing high, if not the highest evidence of what was the real terms of the contract of the parties. It is as follows:

"Know all men by these presents, that we, Horatio Lloyd and William McLean, partners, doing business in the city of Memphis, under the firm name of Lloyd & McLean, for the consideration of \$5.00 to us in hand paid by J. N. Oliver & Co., of the same place, and for the further consideration of \$2,193.05 paid to us by said J. N. Oliver & Co., *by giving credit for the same* on a debt held by them against us, have assigned, transferred and set over, and we do by these presents, assign, transfer and set over to the said J. N. Oliver & Co. our entire interest in a certain *suit* now pending in the Law Court of Memphis, in which we are plaintiffs and the steamer Zephyr and her owners defendants. Said suit is for the sum of \$2,193.05, and the said J. N. Oliver & Co. are hereby fully authorized to collect for their own and sole use whatever may be received on said suit, and their receipt shall be valid. Witness our hands and seals."

Signed by the parties.

This paper was prepared by the attorney of Oliver & Co. and under the direction of Oliver, who gave him the facts at the time. It is proper to add here that the suit failed on hearing against the boat and her owners, probably for supposed want of jurisdiction in a State court, or it may have been on the ground that she was being run by other parties, under a "Charter Party" at the

time. However, it failed on some ground, and nothing was recovered. On these facts it is clear respondents, if liable at all, must either be held on their special contract or the agreement that the claim was to be taken as collateral or on the grounds of fraud. In the first case, no payment has been made, and consequently the balance remains due on their original account. The question whether the claim was taken as a security simply, or accepted in absolute satisfaction of the debt is one of fact.—1st Sneed, 514. This principle is too clear to need the support of authority, as the parties certainly had the right in such a case to make whatever contract they chose, not in violation of law or public policy, and the creditor might well receive payment either in money, property or debts or liabilities of third parties. The instrument on its face expresses with distinctness the idea that it was an assignment made in consideration of a credit for the transfer on the debt held by Oliver & Co. It would be strange if it had been taken as collateral security only, that in so formal a document, drawn by a lawyer, it should not have been so expressed. We think it clear from the terms of this instrument as well as the attending circumstances, that both parties thought the claim perfectly good, both believed it a lien on the boat, and Oliver & Co. being anxious to secure their imperiled debt, eagerly accepted the claim and gave the credit with no thought whatever of taking it as a collateral. This was evidently an afterthought, arising after failure to recover judgment in the Law Court, this disappointing their confident expectation in the result. The question remains whether the bill can be sustained on the ground of fraud or misrepresentation made by McLean & Lloyd as to its being good and a lien on the boat?

It may be conceded that a misrepresentation of facts, whether with or without knowledge of their falsity, upon which a party is induced to act, and does act, is as conclusive ground in equity for relief as an assertion wilfully false, for it operates equally as a surprise and imposition on the other party, though there is less of moral turpitude in such representations in the first case than in the latter.—See Heisk. Dig., p. 483.—“Misrepresentation,” and cases cited. Yet it is equally well settled that mistake of law is not in general any ground for relief, unless such mistake was superinduced by the other party, or there be misplaced confidence or other elements of fraud, such as weakness on the part of the party misled, or other like influences.—Ibid, *Title, Mistake*, p. 438. But here we find no misrepresentation of any fact; on the contrary, as far as we can see, every statement of fact made by

Lloyd & McLean was true. The account was for supplies furnished the boat; it was in suit in the Common Law Court of Memphis, as to whether such a claim was a lien on the boat or not. This was an inference or legal opinion to be drawn from the facts, and the one party knew as much on this subject as the other, at any rate had equal means of knowledge, and this fact of a lien supposed to exist was evidently a reason for eagerly desiring to get this claim. In the language of the Supreme Court of the United States in the case of *Blease v. Garlington*, 2d Otto. 9: "The whole subject was equally open to both for examination and inquiry; under such circumstances neither party is presumed to trust the other, but to rely on his own judgment."

A misrepresentation of a matter of law does not constitute fraud, because the law is presumed to be equally within the knowledge of both parties where the facts are known, and there is no special confidence reposed or trust violated.—*Kerr on Frauds*, p. 90. Here, there has been, at most, but an expression of an erroneous opinion as to the claim being a lien on the boat, and therefore good. But it is clear from the proof that the party did not rely on the opinion of Lloyd & McLean as to this, but as he says, understood it to be that way himself, in which, as he says, "he may have been too smart and thought he knew it all," this remark showing pretty clearly that he acted on his own judgment as to this matter. In addition it is seen that the interest of the parties in the suit is assigned, thus designating precisely the matter in hand.

We conclude that as there was no misrepresentation of the facts and no misplaced confidence, no breach of faith on the part of Lloyd & McLean, and the party chose with the facts before him to take an assignment of the claim, a suit at law, as an unconditioned credit with no guaranty whatever, that it should be collected, he cannot now have relief because it has turned out differently from what he believed would be the result. Buying a lawsuit, he takes the chances as to the fruits of the litigation, nothing more. He loses by reliance on his own judgment, and by failure to ask or require a guaranty, which in all probability would have been given if required, and must bear the result of his want of precaution or foresight. This case is not like the case of *Smith v. Click*, 4 Hum., 186, where a party paid for property in bank notes which were known to be worthless, and which he had passed before and had been returned to him. There was actual fraud and concealment of material facts, which entitled the party to relief; here there was nothing of the kind,

but the facts truly stated. The error, if any, was one of judgment as to the legal result of the facts.

We may add that it is not by any means certain that a maritime lien did not exist against the boat for supplies furnished, if it had been sought to be enforced in a Federal Court having jurisdiction in such cases, the home port of the boat, as we understand, having been in St. Louis, Mo., and not Memphis. However, we determine nothing as to this question, as we do not deem it material to the proper conclusion in the case. The result is, the Chancellor's decree must be reversed and the bill dismissed with costs.

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J. N. WYATT v. W. M. WATKINS.

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Jackson, April Term, 1877.

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**PROPERTY NOT IN ESSE.**—IS THE SUBJECT OF A VALID MORTGAGE.—A crop yet to be planted is the subject of a valid mortgage. Such an assignment is held by the court to be lawful.

**CASES CITED.**—*Grantham v. Hawley*, Hob. 132; 1 Pow. Cont. 158, 158; See Walp. Ed.; *Benj. on Sales*, §. 78; *Hutchinson vs. Ford*, 9 Bush. 318; *Fverman vs. Robb*, 3 Cent. L. J., 735; *Orin v. Sill*, 8 Wend. 111; *Lunn v. Thornton* 1 Man. Gran. & Scott, 379; *Barnard v. Eaton*, 2 Cush. 295; *Bank of Lansingburg v. Cary*, 1 Barb. 542; *Comstock v. Scales*, 7 Wisc. 159; *Redd & Co. v. Burrus & Williams*, Mss., Geo. 1877; *Andrew v. Newcomb*, 32 N. Y. 417; 3 Law Reg. 19-33; 17 Con. 144; *Holroyd v. Marshall*, 10 House of Lords Cases, 189; 18 Pick. 168; 14 Pick. 496; 10 Met. 481; 12 Cush. 370; *Brett v. Carter*, Cent. L. J. May 5, 1876; 32 New Ham. 484; 18 Vern. 465; 1 McCeslin's Ch. Rep. 408; 21 Wisc. 551; 26 Ill. 121; 48 Ala. 109; *Butt v. Ellett*, 19 Wall. 544; 42 New York, 620

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SNEED, J., DELIVERED THE OPINION OF THE COURT.

The agreed case shows that the plaintiff agreed to furnish one Houston McCain with supplies, on condition that McCain, who was a farmer, should execute to the plaintiff a mortgage of his cotton crop, for the then current year (1875,) as a security for the supplies so furnished. A deed of trust to that effect was accordingly executed in February, 1875, "upon a crop of cotton to be planted and grown upon the land of the said McCain in the



year 1875, to secure said Wyatt for supplies furnished and to be furnished to said McCain, *to enable him to make said crop.*" This deed of trust was duly registered. When the crop matured and became subject to levy, the defendant, Watkins, having recovered a judgment against McCain for the sum of \$42.95 before the execution of the deed, caused an execution to be levied on enough of the cotton to discharge his debt; and this action was brought to determine who has the better right. The question presented is, whether a crop of cotton yet to be planted is the subject of a valid mortgage; and the adjudged cases seem to be very much in conflict on the subject. A humane policy would seem to favor the affirmative of the proposition; as, if such is the law, the indigent farmer may obtain credit upon his prospects, and be enabled to subsist his family pending the cultivation of his crop. The case of Grantham vs. Hawley, reported by Sir Henry Hobart in the reign of James I., is one of the earliest upon the subject, and has been frequently cited in support of the doctrine that a thing not *in esse* may be the subject of a valid chattle mortgage. That case, as cited, was as follows: A man seized of land let the same by indenture for twenty-one years, and covenanted that it should be lawful for the lessee, his executors and assigns, to carry away to his own use *such corn as should be growing* upon the ground at the end of the term; and afterwards the lessor released his reversion; and one question was, whether the lessee was entitled to corn so growing; and it was argued, on the part of the assignee of the reversion, that it was merely contingent whether there should be corn growing upon the ground at the end of the term or not, and that the lessor never had property in the corn; and, therefore, could not give nor grant it; for the right to the corn standing at the end of the term, being certain, accrued with the land to the lessor. But judgment was given against the reversion, because it was said that the property, and very right of the corn when it came into being, was passed away, for this was both a covenant and a grant; and, therefore, if it had been of natural fruits, as of grass or hay, which run merely with the land, the like grant would have carried them in property after the term. Then, though corn were *fructus industrialis*, so that he that sowed it might seem to have a kind of property *ipso facto* in it, divided from the land, and, therefore, it would go to the executor, and not to the heir; yet, in this case, all the color the reversioner had to it was by the land which he claimed from the lessor who gave the corn; and though the lessor had not the corn actually

in him, nor certain, yet he had it potentially, for the land was the mother and root of the fruits. Therefore, he that had that, might grant all fruits that might arise upon it afterwards, and the property would pass as soon as the fruits were extant."—Hob. 132. 1 Pow. Cont., 157, 158, 2 Walp. Ed.

When stripped of all quaintness of verbiage, the plain doctrine of this old case is, that he who owns the soil may sell or assign the crops to be grown upon it. It is said in Benj. on Sales, that in relation to things not yet in existence, or not yet belonging to the vendor, the law considers them as divided into two classes, one of which may be sold, while the other can only be the subject of an agreement to sell—of an executory contract. Things not yet existing which may be sold, are those which are said to have a potential existence, that is, things which are the natural product, or expected increase, of something already belonging to the vendor. A man may sell the crop of hay to be grown on his field, the wool to be clipped from his sheep at a future time, the milk his cow will yield in the coming month, and the sale is valid. But he can only make a valid agreement to sell—not an actual sale—where the subject of the contract is to be something to be afterwards acquired; as the wool of any sheep or the milk of any cows that he may buy within the year, or any goods to which he may obtain title within the next six months.—Benj. Sales, S. 78. The precise point now in judgment, however, has been adjudged against the proposition, that a thing not *in esse* is the subject of a valid sale or mortgage. Thus, it was held in Hutchinson vs. Ford, 9 Bush. 318, where this exact question was involved, that "a mortgage of a crop to be raised on a farm during a certain term, but which is not yet sown, passes no title, and the mortgagee has no claim against a purchaser of the crop for it, or its value."—Everman vs. Robb, 3 Cent. L. J., 735. Olin vs. Sill, 8 Wend. 111. Lunn vs. Thornton, 1 Man. Gran. & Scott, 379, Barnard vs. Eaton, 2 Cush. 295.

Bank of Lansingburg vs. Cary, 1 Barb. 542; Comstock vs. Scales, 7 Wise. 159; Redd & Co. vs. Burrus & Williams, Mss. Geo., 1877.

Many other authorities might be cited to the same effect, and quite as many that look in the other direction.—Andrew vs. Newcomb, 32 N. Y., 417; 3 Law Reg. 19-33; 17 Con. 144; Holroyd vs. Marshall, 10 House of Lords Cases, 189; 18 Pick., 168; 14 Pick., 497; 10 Met., 481; 12 Cush., 376; Brett vs. Carter, Cent. L. J. May 5, 1876; 32 New Ham., 484; 18 Vern., 465; 1 McCaslin's Ch. Rep., 408; 24 Wise, 551; 26 Ill. 121; 48 Ala. 109;

Butt vs. Ellett, 19 Wall. 544; 42 N. Y., 620.

In one of these cases, it is said: "In the case of crops to be sown, it vests potentially from the time of the executory bargain, and actually as soon as the subject arises."—Andrews vs. Newcomb, 32 N. Y. Rep., 417. Mr. Story says that rights in remainder and reversion, possibilities coupled with an interest, rents, franchises and choses in action, are capable of being mortgaged.—E. g., per S. 1021. A court of equity, he says, will support assignments, not only of choses in action, and of contingent interests and expectancies, but also of things which have no present, actual, or potential existence, but rest in mere possibility; not, indeed, as a present positive transfer operative *in presenti*, (for that can only be of a thing *in esse*,) but as a present contract, to take effect and attach as soon as the thing comes *in esse*.—E. g., per S. 1040. Among the examples he cites, is that of the assignment of the head-matter and whale-oil to be caught in a whaling voyage now in progress. The right will attach to the head matter and whale oil when attained.—Id. So strongly are courts of equity inclined to uphold assignments when *bona fide* made, that even the assignments of freight, to be earned in the future, is good in equity, and will be enforced against the party from whom it becomes due.—Id. 1055. In Story on Sales, it is said, "While a person cannot make a present sale of all the wool there may grow on a sheep, which he may hereafter buy, nor any other thing in which his interest is wholly prospective and doubtful, there may be made a valid sale of the wine a vineyard is expected to produce, or the grain a field is expected to grow, the milk of a cow for the next year, or the future young of animals.—Story on Sales, S., 183; McCarty vs. Blivens, 5 Reg., 196. Whatever is the subject of a valid sale is, of course, the subject of a valid mortgage. A man may sell or mortgage everything that is his property; and such a sale, if *bona fide*, will be upheld in law and equity. Property is the right and interest a man has in lands and chattels to the exclusion of others.—17 John's, 283; 11 East, 290; 4 Pet., 511. All property, real or personal, corporeal or incorporeal, movable or immovable, may be the subject of mortgage.—1 Hill, Mort., 6. Things are said to have a potential existence when they are the natural product, or expected increase, of something already belonging to the vendor.—Low vs. Pew, 11 Am. Rep., 357. The term incorporeal properly includes all legal rights. The right in the proprietor of the soil to plant, cultivate and gather his crops, to the exclusion of all others, is an absolute legal right, and an

incorporeal property; and incorporeal property is as well the subject of valid sale and mortgage as any other kind of property. The mortgagor, in this case, was the proprietor of the land on which he proposed to raise the crop in controversy. The crop had a potential existence because it was to be the natural product and expected increase of the land then owned and occupied by him. Why may he not obtain the credit necessary to make the crop by executing a mortgage upon it? We see no sound reason why. Who is to be injured by it if the transaction is *bona fide*, and there be no superior lien for rent or otherwise? Who is to be misled by it if the transaction is at once published to the world by registration, as was done here? If the merchant is willing to furnish him with supplies, and enable him to make the crop, and take the risk of the crop itself for security, who has a right to complain, and where is the *mala fides* of the transaction? Is there any doubt that a court of equity would sustain the mortgage, and protect the mortgagee, in such a transaction? Then, wherefore must he fail in a court of law, into which forum the parties have brought the case, and where our liberal statute requires that, in such a case, their rights shall be adjusted upon equitable principles. In the case of *Andrews vs. Newcomb*, above cited, it is said that, as long as the time of Ch. J. Hobart, it was held that one proposing to plant crops might convey them in advance, and that the fruits which should arise afterwards, would pass as soon as they were extant; citing Hob. 132; 3 Johns, 216, and *Hare vs. Celay*, Cro. Eliz., 143. Crops to be raised, say the court, are an exception to the general rule, that title to property not in existence cannot be affected so as to vest the title when it comes into being. In the case of crops to be sown, it vests potentially from the time of the executory bargain and actually as soon as the subject arises.—32 N. Y., Rep. 421. The judgment, in this case, certainly created no lien upon the crop, which the statute protected from levy until after maturity. The judgment debtor had failed with his title, and the judgment creditor could stand on no higher ground than his debtor. We hold the assignment to be lawful and valid, and that the plaintiff below has the better right to the fund in controversy.

Affirm the judgment.

## MOORE &amp; MILLER vs. GEO. A. STOVALL.

Jackson, June 3, 1876.

A PROMISE TO ANSWER FOR THE DEBT OF ANOTHER.—NOT WITHIN THE STATUTE OF FRAUDS.—WHEN.—An agreement made by the vendee of lands to pay part of the purchase money to a creditor of the vendor, is not within the statute of frauds. This case overrules the case of Campbell v. Finley, 3 Hum. 330.

CASES CITED.—3 PARSONS ON CON. 24.—[ED.]

TURNEY, J., DELIVERED THE OPINION OF THE COURT.

DEADERICK, CH. J. AND SNEED, J. DISSENTING.

The statute which provides that no action shall be brought whereby to charge a party upon a special promise to answer for the debt, default or miscarriage of another, unless such a promise or agreement be in writing, etc., does not, in the opinion of a majority of the court, apply to the facts of this case, and can in no way affect it. The land was bought at a stipulated price, to be paid for at stated times, one of the payments to be made to Moore & Miller. While it is true the vendor was indebted in that sum to Moore & Miller, and such indebtedness was the inducement moving him to have the defendant undertake to pay to Moore & Miller. Still, it was nevertheless an undertaking by the defendant to pay his own debt and not the debt of the vendor of the land, and although the payment, when made, would have the effect to discharge the vendor's obligation to Moore & Miller, yet that indebtedness would be in no manner changed or altered before the payment.

The defendant undertakes and promises alone for himself for a valuable consideration. He was satisfied with the price, and it can make no difference to him to whom he shall pay it, so he complies with the terms of his own contract. By his contract he created an indebtedness from himself to Moore & Miller, and should not be heard to gainsay it. We think the case of Campbell v. Findley, 3 Hum. 330, is unsustainable and must be overruled.

Reverse the judgment.

*note. The case of Murphy v. Rutherford, 12 Mo. 397 is in accord with Campbell v. Findley, 3 Hum. 330, which is right?*

I concur in the conclusion that this case is not within the statute of frauds. I entertain some doubt as to whether this plaintiff can maintain an action *at law* for want of priority of contract with the defendant, but it may be that this distinction between a remedy at law or in equity ought not to be longer maintained.

McFARLAND, J.

## DISSENTING OPINION.

I do not concur in the opinion of the majority of the court.

The plaintiffs sue the defendant at law to recover the balance due upon a note executed by Moses E. Johnson to them.

They sold and conveyed to Johnson a tract of land in Arkansas, retaining a lien, and took several notes, among others one for \$2,680.22, payable 1st of Jan., 1860.

This deed from the plaintiffs to Johnson was made in Sept., 1857.

In December, 1860, Johnson sold and, by deed of that date, conveyed to defendant Stovall the same tract of land, also retaining a lien for unpaid purchase money. This deed recites "that the said Geo. A. Stovall assumes the payment of a note for \$2,680.20 drawn by said Moses E. Johnson, and dated 14th September, 1857, payable to James T. Moore and William S. Miller on the 1st of January, 1860, on which is credited \$1,000 May 22, 1860. The said note, as the deed recites, was executed in part payment of said land by said Johnson to Moore and Miller, and is now in the hands of W. K. Poston to be delivered to said Moore & Miller when they make a perfect and valid title to said land, and not till then, and it is expressly agreed and understood that the said Stovall is to stand in the shoes of said Johnson as to this note, and is not to be bound for its payment until the compliance with said condition."

The deed containing the above recitals was signed by Johnson and his wife only.

In January, 1861, Stovall and wife conveyed the same land to John B. Cobb, and in describing the land refers to it as being the same land conveyed by Moore & Miller to Johnson by deed dated in September, 1857, and by Johnson and wife to him. Stovall, by deed dated December, 1860, but no reference is made to any purchase money remaining unpaid which Stovall was bound to pay.

The Circuit Judge charged the jury that there was no competent evidence to sustain the plaintiffs' claim, and the jury found for the defendant, and plaintiffs have appealed to this court.

The instructions of the court were founded upon the absence of any written agreement or promise of Stovall to pay the debt of Johnson.

Our statutes of frauds and perjuries provides that "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of

another person," "unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized.—Code § 1758.

The debt for which it is sought to hold Stovall liable is one due by note from Johnson to Moore & Miller. There is certainly no written promise by Stovall, signed by him, to pay it, and the case is clearly within the provisions of the statute of Frauds, and the principles of the case of *Campbell v. Findley*, 3 Hum., 330, which has been followed and approved by this court. In this case Johnson owed Moore & Miller a debt evidenced by note for which a lien was retained in their deed to him. It is not pretended that this lien, or the liability of Johnson to Moore & Miller was released. Both the liability of the note and the lien for its payment are still subsisting, and whatever verbal promise was made by Stovall, if any, to pay the debt of Johnson was a collateral promise to Johnson to pay his debt, and this case falls within the principle of *Campbell v. Findley*, 3 Hum., and the promise, to be binding, must be in writing. Johnson in his conveyance also retains a lien upon the land conveyed to Stovall, and for which Johnson has a right to sue him, and the effect of the holding of a majority of this court is to decide that Stovall owes both Johnson and Moore & Miller. There are cases holding apparently a different rule, 3 Parsons on Con., 24, and notes, but I am of opinion that our own direct adjudications on this question should be followed in preference to the decisions of other courts.

The judgment of the Circuit Court, in my opinion, was correct and ought to be affirmed.

DEADERICK, Ch. J.

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Judge Sneed concurs in this dissenting opinion.

**JAMES T. GLEAVES vs. DAVIDSON & WILSON CENTRAL  
TURNPIKE CO.**

**Nashville, April Term, 1875.**

**FRANCHISE OF TURNPIKE CORPORATION.—JURISDICTION OF CHANCERY COURT.—  
TO DECREE SALE OF.**—The Chancery Court has jurisdiction to subject the road  
beds, gates, toll houses, lands on which the houses are situated, and the privi-  
lege of charging and collecting tolls, to sale for the satisfaction of debts of the  
company.—[Ed. 10 Feb., 49]

NICHOLSON, CH. J., DELIVERED THE OPINION OF THE COURT.

Complainant is a judgment creditor of defendant, and files his bill in the Chancery Court at Nashville, and seeks to subject all the property, assets, roadbed, toll gates, toll houses, and land upon which the same are situated, and the franchises of the company to the satisfaction of his debt, and of such other creditors of the company as may come in and make themselves parties.

Defendant is a corporation, created in 1857-8, for the construction of a turnpike road, eighteen miles in length, situated in Davidson and Wilson counties. The company is authorised to erect gates and receive specified tolls, and to purchase and hold real estate at each gate, and to have private property condemned for the right of way, etc. Besides this, the company was to have the customary favors of corporation.

The road was built and gates erected, and tolls collected, etc. Its property consisted of its road bed, its gates, toll houses, and land on which they were situated, and the privilege of collecting tolls at the several gates.

This property was attached, under the bill, and placed in the hands of a receiver, from whose report, as well as the admission of the defendant, the company is insolvent.

The chancellor gave complainant a judgment for the amount of his claim, and continued the receiver for the purpose of paying the judgment out of the tolls, but refused to decree a sale of the property of the company, upon the ground of want of jurisdiction.

From this decree complainant has appealed.

The only question for our determination is, whether the Chancery Court has jurisdiction to subject the road beds, gates, toll houses, lands on which the houses are situated, and the privilege of charging and collecting tolls, to sale for the satisfaction of the



debts of the company? After a careful examination of the elaborate argument furnished by complainant's solicitor, we deem it unnecessary to do more than to state that we are satisfied that the Chancery Court had jurisdiction to decree a sale of all the property, real and personal, of the company, including the privilege of charging and collecting tolls. As the court is not asked to decree a sale of the franchise or privilege of being and acting as a turnpike corporation, and of taking private property upon making compensation, we deem it unnecessary to express any opinion as to the power of the Chancery Court to decree such a sale.

The decree of the Chancellor will be reversed to the extent herein indicated, and a decree rendered in accordance with this opinion. The costs will be paid out of the proceeds of the sale.

GEO. B. MILLER, *et al.*, v. ALLEN HARRIS, *et al.*

Jackson, June 12, 1877.

1. **MULTIFARIOUSNESS—WHAT IS.**—A bill is multifarious when several matters of a distinct nature are complained of against divers defendants, or a bill that unites against a single defendant several distinct matters; the Court must look to the circumstances of each case to avoid multiplicity of suits, on the one hand, and inconvenience to defendant and confusion of evidence, on the other.

2. **PARTNERSHIP—STATUTE OF SIX YEARS DOES NOT RUN AGAINST PARTNER—WHEN.**—No right of action for an account accrues to a retiring partner that can be "effectually prosecuted" until the liquidating partners, having possession of the assets, have settled the debts of the partnership; the statute of six years, in such case, does not run against the retiring partner.—[Ed.]

CASES CITED.—Story Eq. Pl., § 274, 530; 2 Gray 471; 3 Stor. C. C. 25; Story Part., § 326; Chitty Cont. 288; 3 Kent Comm. 57; 17 Pick. 519.

SNEED, J., DELIVERED THE OPINION OF THE COURT.

The Chancellor's decree disallowing the demurrer to the amended bill was correct, and must be affirmed.

1. The bill is not multifarious. A bill is multifarious when several matters of a distinct and independent nature are com-

plained of against divers defendants, or where one bill unites against a single defendant, several matters perfectly distinct and unconnected—the latter is more properly called misjoinder. On a question of multifariousness the Court must look to the circumstances of each case to avoid, on the one hand, multiplicity of suits, and on the other, inconvenience and hardship to defendants in being called upon to defend as to matters that have no connection, and to avoid complication and confusion of evidence.—Story Eq. Pl., §§ 274, 530 ; 2 Gray 471 ; 3 Stor. C. C. 25. The bill seeks a settlement of several commercial partnerships of which the complainants and defendants were members, the whole of which may be well settled under one litigation rather than by a multiplicity of suits. It is certainly to the interest of all parties that one litigation should settle the whole matter, and the interests and business of the several firms would in such a case be so intermixed and blended that they could not be so satisfactorily settled in several suits as in a single litigation.

2. The remedy of the complainant, George B. Miller, was not barred by the lapse of six years from the date of his retirement to the time of the filing the bill. He was, for many purposes, still a partner, and as the assets of the firm became, on his retirement, a trust fund for the payment of partnership debts, his right of action for an account did not accrue until after the firm debts were discharged. The bill shows that the firms were largely indebted. The retiring partner was, as to the assets of the firm, a tenant in common with the remaining members of the firm, and equity would fix upon them a relation of trust in favor of the retiring partner, which would be, under such a defence—to say the least of it—no favorite with a Court of equity. It is sufficient to say, however, that no right of action for an account accrued to the retiring partner, that could be “effectually prosecuted” until the liquidating partners having possession of the assets had settled the debts of the partnership.—Story Part., § 326 ; Chitty Cont. 288 ; 3 Kent Comm. 57 ; 17 Pick. 519.

Affirm the decree and remand the cause.

WADE *v.* ORDWAY, *et als.*

Nashville, 1871.

1. INSTRUCTIONS TO JURY—IN ABSENCE—OF COUNSEL.—While it is improper for the Court to instruct the jury in the absence of the parties' litigant, thereby depriving them of the opportunity to except, or to ask for qualification of the instruction, yet the Court hold, where it can clearly be seen that no injury has been done to the party by the instruction given; in a case of such slight departure, no reversal can be had for such action.

CASE CITED.—Taylor *v.* Jones, 2 Head. 565.

2. JUROR—AFFIDAVIT OF—WILL NOT BE RECEIVED—WHEN.—Affidavits of jurors will not be received for the purpose of showing that the jury misunderstood the charge of the Court, or that they failed to follow his charge, or that the verdict was rendered in a mistaken opinion as to the law or facts of the case.

CASES CITED.—3 Hump. 333; 4 Hump. 518.

3. EVIDENCE—DISCOVERED BY JUROR—AND RELATED AFTER RETIREMENT—NOT COMPETENT—AFFIDAVIT THE PROPER MODE OF BRINGING THE FACT BEFORE THE COURT.—Evidence submitted to the jury shall be sworn evidence, submitted in open Court, under the safeguards of the law, and open to cross-examination, or liable to be met by countervailing proof on the part of the party who may be affected by it; evidence, therefore, discovered by one of the jurors, and related to his fellows after retirement, is incompetent. An affidavit of a juror is the proper mode of bringing such facts before the Court; the deliberations of the jury being secret, in no otherwise could the fact be developed.

CASES CITED.—6 Greenl. 379; Price *v.* Warren, 1 Hen. & Mumford, cited in Gra. & Waterman on New Trial, vol. 2nd 335; Douston *v.* State, 6 Hump. 275.—[Ed.]

## FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

This suit is brought by Wade to recover about \$12,000, or its value, of uncurrent bank bills deposited with defendants, to be sold by them as brokers as they might be directed by Wade or his agent.

Several questions are urged here for reversal of the judgment had in favor of defendants in the Circuit Court, some, or all, of which we proceed to notice.

First, it is insisted there is reversible error in the action of the Circuit Judge, as is claimed, in charging the jury a second time, on their return into court, in the absence of the plaintiff and his counsel.

The facts, as stated in the record by his honor himself, are substantially as follows: The jury were called in, after having been engaged for some length of time in considering the case, late in the evening, and enquired of by the Judge as to the cause of their failure to agree—he asking them whether they were differing as to what the witnesses had stated or as to the law of the case. He told them that if they were differing as to what the witnesses had said he would have the witnesses recalled and interrogated as to their evidence; but if they were differing as to

the law of the case, he would endeavor to instruct them, at the same time stating to them "that the jury must take the law from the Court as it was charged to them, and not attempt to decide the law for themselves in disregard of the instructions of the Court; that if the Court erred it could be ascertained, and the Supreme Court could review and correct it; but if the jury undertook to decide the law for themselves no one would know upon what principle they had decided, that their errors might not be ascertained, and the party injured thereby would be without remedy." At this point one of the jurymen stated to the Court that the matter on which they had disagreed was the question of what constituted ordinary diligence, and gave his own understanding in the form of a question to the Judge as to what it was, which, not being correct, in the view of the Court, he stated to the jury the correct rule in reference to such diligence.

This is the statement of the facts which the Court has put down in the form of an entry of record, giving his reasons for not granting the motion for a new trial.

The question is, does the above statement contain error for which this Court should reverse?

While it is certainly a sound rule, and one that ought not to be departed from, that the counsel engaged in a case should be present when the Court gives his instructions to the jury as to the law of the case, yet this sound rule must not be pushed to the extent that a slight departure from it shall be held sufficient to put the inferior Court in error and reverse the case. The principle on which the rule stands is, that the parties litigant may hear the law, as given by the Judge to the jury, may thereby be prepared to except, in case it is deemed erroneous, or to ask for such qualification of the instruction as may be thought proper, or such additional instruction as the facts of the case may warrant. To hold that when the Court merely answers a question, giving the same instruction substantially, as he had given in his original charge, and stating a rule to the jury to which no exception can fairly be taken, that an error has been committed, for which this Court should reverse, would be to uphold the letter of the rule of practice but to disregard its spirit and principle. We hold, therefore, that where we can see clearly, as in this case, that no injury has been done to the party by the instruction given; in a case of such slight departure from propriety, as we find here, that this Court cannot reverse for such action:

We have examined the cases referred to by counsel, supposed to maintain a different view, and need only say, that most, if not all, of them were very different in their facts from the one now under discussion, and in so far as they may seem to carry the rule further than we have above indicated, we do not feel disposed to approve them. We see in this record what was done and said from the statement of the Judge himself, which we must take as the most trustworthy information to be had, on the general principle that every presumption is in favor of the integrity and uprightness of a high judicial officer, acting under the mighty sanctions of his high position.

It is insisted, however, that the remarks of his honor as to the duty of the jury in following the law as given by the Court, and the danger of a juror taking the law into his own hands, were improper, and that these remarks did influence and control the action of the four or five jurymen who had up to that time been favorable to plaintiff's side of the case. The case of *Taylor v. Jones*, 2d Head. 565, is supposed to sustain this proposition. While we doubt the propriety, under our system of jury trial, of attempting to hasten the action of a jury in coming to a conclusion on the facts of the case or urging upon them considerations based on the expense and annoyance of another trial in order to induce them to agree upon a verdict, as being calculated, coming from such a source, to unduly influence the minds of a jury by considerations not growing out of the evidence in the cause, yet we are unable to see any thing in what was said in this case to which any objection can properly be urged. What was said in this case is strictly correct. It is the duty of the jury in a civil case to follow the law given them by the Court and not to take it into their own hands. In the case referred to, the Court told the jury of the importance of agreeing on account of expense to the parties, that he must keep them together until they could agree, and then said to them, that in some cases he had been almost constrained to tell juries that it would be better for them to find a wrong verdict than not to agree at all, as any error *we* may commit may be corrected by the Supreme Court." This Court reversed that case on account of the above remarks to the jury, mainly on the ground that it was, in the language of the Court, a mistake in his honor to tell them, that this Court could correct any error they might commit, on account of the great weight given here to the finding of a jury. The Court also disapproved of the threat of his honor to keep the jury together until they could agree. We think the case was properly decided, but find in it

nothing that will sustain the objection presented to what his honor said in the present case.

An affidavit of a juror is presented in which he purports to give the facts as to what occurred when the jury came into the Court-room. This jurymen says, that when he put the question as to what was ordinary diligence, the Judge did not reply to his question, but remarked to the jury, that if they took the law into their own hands nothing could be done, but if he, the Court, charged the law wrong, "he would be corrected by the Supreme Court." He then goes on to say that next morning the other four of the jurors, who had been with him, had gone over to the other side on the ground, as they said, that his honor, in the above remark, was alluding to them, and had told them in effect, as they took it, they were doing wrong. We need only say that if the matter of this affidavit could be looked to at all, it would not be sufficient on which to affect the verdict of the jury in this Court; it would amount to nothing more than a statement by a jurymen, showing the grounds and motives that influenced other members of the jury in coming to their conclusions, or what they had said were the ground, as he understood them. It appears, too, from what the affidavit says, the Judge did say, that there was nothing in it that should have led to such a conclusion, as it does not appear that his honor knew any thing as to how the jury stood, nor does the remark, in the slightest degree, indicate an application to the one or the other party of the jury, as they stood divided. We are bound to presume entire impartiality in the Judge, and see nothing, in the slightest degree, to militate against this presumption in the facts of this record; on this subject the rule is too well settled to need discussion, that affidavits of jurors will not be received for the purpose of showing that the jury misunderstood the charge of the Court, or that they failed to follow his charge, or that the verdict was rendered in a mistaken opinion as to the law or the facts of the case.—3d Hum. 333; 4th Hum. 516. Such an affidavit as the one presented should not be received at all, and certainly is entitled to no right whatever. Affidavits of jurors must be received with great caution, and while there are cases in which they are proper, as is recognized by the remarks of this Court in 4th Hum. 518, yet clearly the facts disclosed in the one now under consideration do not bring it within the rule.

We come now to a question presenting more of difficulty in its solution. It is insisted that a new trial should have been granted, because of statements, in the form of new evidence of

facts ascertained by himself during the consideration of the case, were presented to the jury by one of their number.

The facts on this question are presented in an affidavit of a juror—T. W. Ballou. He says, that a discussion had been had at the bar in argument of the case as to whether Mr. Lusk could have seen the robbers as they passed out of the door on the day in which it was alleged that the office of defendants was robbed, by knocking Mr. Lusk down, and as to whether he could have seen them, as he stated, unless he had been standing up, and if so, that he was guilty of negligence in not giving the alarm promptly, as it was in open day-light, on a public street near the Public Square, in the city of Nashville. The affidavit further states, that the plaintiff's counsel was interrupted in his argument by defendants' counsel, who stated that the counter was not of wood, but that the iron railings, that had been proven to be about three feet high on the counter, run down to the floor, with holes through it, so that Lusk, the witness, could see through them whilst lying on his back on the floor. He then adds, as the new evidence that Mr. Robertson (one of the jury) came into the jury-room one morning before they had agreed upon a verdict, and said, "he had discovered some new evidence; that he had been around and examined the counter and found that the iron railing run down to the floor; he described it as a kind of lattice work, and said, he asked if the counter then was as it had been when the robbery was committed, and was told it was, and that it could be seen through by Lusk whilst lying on the floor." It is evident from the facts detailed in this affidavit that the question as to whether the witness, Lusk, could see the robbers as they passed out of the door was one that had attracted the attention of the jury, and probably had been a matter of discussion among them, and in some way was deemed material in coming to their conclusion. The evidence of Lusk, who was the Teller of the bank, or brokers' office, of defendants, and the only man in the office at the time of the alleged robbery, had shown that he was standing at the counter, leaning upon it, that while in this position he was struck down by a slung-shot, as he described it, striking over the eye, felling him to the floor; that when he fell he was senseless from the blow, and when he recovered he found himself on the floor with a man on him holding him by the throat. He says, that he swooned again, and when he became again conscious of what was going on around him, he saw another at the safe, or about the safe. On cross-examination he was asked if he saw the

robbers when they went out of the front door, and answered, that "he saw one of them as he went out of the front door, and shut it." In describing the counter behind which he was standing, and which run entirely across the room, he said, the counter was made of wood, and rose up from the floor higher than his waist; that it was higher than usual; that upon this counter was an iron railing some two or three feet high, which was fastened to the counter firmly; that this railing was a kind of lattice work, and was put there to keep any one from getting over the counter, and yet could be seen through; this railing, about midway of it, had an opening about twenty inches wide, where the money was paid out, and through this opening the blow was given. On the testimony of this witness rested almost alone the case for the defendant, and from the mode of his cross-examination, and from the matter of his testimony, it is evident that the effort on the part of the plaintiff was to break him down by showing inconsistencies, or at any rate unreasonableness and improbability in the story told by him. This was so apparent to the defendant that they felt the necessity for sustaining him by proof of his good character and standing in the community. With this seen, many of the leading facts bearing on this point, the question is, whether, on sound principle, the statement made to the jury by the jurorman was of such a character as that its introduction was cause for a new trial, and such error as this Court must treat as basis for reversal.

It is urged, in the argument of the learned counsel for defendants, that we have no case in our books in which it has been held that the affidavit of jurors will be received in a civil case to show that one of the jurors gave information to the jury after retirement. Several cases are cited from our sister States, and the Supreme Court of the United States, where it has been held that new trials would not be granted on information given to the jury by a fellow juror after retirement, some of them qualifying the rule, however, by the statement that when substantial justice has been done, a new trial would not be granted, and others treating the fact that the jurors stated they were not influenced by the new evidence in formation of their verdict as a material consideration.—Sec. 6th, Greenl. 379; *Price v. Warren*, 1st Hen. & Munford, cited in *Gra. & Waterman on New Tri.*, vol. 2d 355.

We believe it is true that in no civil case has it been held in Tennessee that a new trial should be granted on the fact disclosed by affidavit of a juror, that statements were made to the jury by a fellow juror, bearing on the matter of investigation, yet



we find a number of criminal cases where new trials have been granted upon such affidavits. We may add, that no civil case is shown where it has been held in our State that such fact would *not* vitiate the verdict, so that the direct question is, perhaps, an open one. We may well look to the cases reported in our State as furnishing reasons and analogies to guide as to our conclusion on the question.

In the case of *Donston v. State*, 6th Hum. 275, one of the jurymen stated to his fellows, after they had retired, that he had heard a witness who had been examined on the trial (whose credibility had been attacked), sworn before the grand jury, and that his statement was the same he made before the traverse jury. This was held to vitiate the verdict. It is true it is said in the opinion, the jurors making the affidavit stated, that these statements greatly influenced them in finding a verdict, but the principle on which Judge Turley rests the opinion of the Court seems not to have been based on this statement, for he says, "it has always been held in this State that the testimony given to a jury, after it has left the presence of the Court, vitiates the verdict, because it is not given on oath, and is given without the knowledge of those to be affected by it, and who have therefore no opportunity of uniting and repelling it." In *Booby v. State*, 4th Yer. 114, 115, a new trial was granted on affidavits, disclosing statements bearing upon the case, made by a juror to his fellow jurors after their retirement. In that case it is true the statement is made in the affidavits, that the jury were influenced by the facts given them by the jurymen, but the principle laid down by the Court does not grow out of this fact, nor is it based on it. Judge Whyte, in opinion of the Court, says, "the verdict is too palpably vicious to require the citing of authorities to prove it ought not to stand." What the juror knew of the defendant ought to have been proposed and offered in Court, and if admissible, there rendered, to be observed upon by defendants' counsel. In the case of *Sam v. The State*, 1st Swan. 61, a jurymen made a statement as to where the line of the county was, it having been a controverted question as to whether the offence was not committed in a different county than the one in which the party was indicted. In this case the jurymen, Brock, stated in answer to interrogatories put by the Court, as shown by the bill of exceptions, "that the information communicated by his fellow jurors exercised no influence whatever upon him in making up the verdict, and that he thought or believed they could have come to the same conclusion from the testimony in the cause." Judge

McKinney, in the opinion in this case, says, in substance, "that it was not for this Court to say whether the testimony was sufficient to have supported the verdict independent of the statement made to the jury; neither was it relevant to inquire what influence the improper evidence received by the jury may or ought to have exerted upon their minds in settling the disputed question of venue." It is sufficient, he adds, that while determining this question they received fresh evidence which, if, indeed, it were not wholly without effect, must have conduced in some degree to the decision of the controverted point. He then goes on to state the rule, that the verdict of the jury must be found on the evidence delivered to them in Court, in the presence of the Judge and parties. He then states the rule on page 65 to have been long established and inflexible, to which no objection can be admitted, either in civil or criminal cases. It is true, he says, in criminal cases it is more emphatically the right, because of the provisions of our Constitution, that the accused shall have the right to meet the witnesses face to face. He then proceeds to vindicate the rule, on sound principles of reasoning, that we think eminently satisfactory. He says, to hold the opposite would expose our jury trials to the danger of being perverted to the grossest injustice and oppression. In answer to the idea that the Judge might say that there were sufficient evidence adduced at the trial to justify the finding of the jury, and that the evidence improperly given to them could have had no influence upon the verdict, that this was purely a matter of fact not in the province of the Court to determine. It is impossible he should be able to do so, because the law has no criterion by which to know or ascertain the effect which the admission of improper evidence, if of any force or relevancy whatever, may produce upon the verdict of the jury. The effect might be different, and of necessity, would be so, on different minds, according to the mental and moral qualities of the individuals composing the jury, their intelligence, powers of discrimination, and a thousand other considerations; and, therefore, the law excludes all irrelevant and illegal evidence. He goes on then to remark upon the statement of the juror, that he was not influenced, treating this as not of any weight, and concludes with the rule, that when improper evidence is allowed to go to the jury it is enough that the case may have been prejudiced thereby, and the law will so presume.

It is true all these cases were criminal cases, but the principle on which they go is equally applicable to civil as well as criminal

cases—that is, that the evidence submitted to the jury shall be the sworn evidence submitted in open court under the safeguards of the law, and open to be sifted by a cross-examination, liable to be met by countervailing proof on the part of the party who may be affected by it. We can see no sound reason why the rule should be departed from in civil cases and upheld in criminal cases, as it is based on principles equally applicable to the one as to the other; and such was the opinion of Judge McKinney, in the case cited, though it may not have the weight of a positive decision, because said in a criminal case and not in a civil one. We may add, that we see nothing in the state of things around us in reference to public morals or individual sensibility, where property rights are concerned, to make us feel that any and every safeguard protective of our jury trials from improper influences should not be sternly upheld; on the contrary, we see much that makes us feel the necessity, or at any rate the propriety, of not only maintaining all the safeguards heretofore established, and even, if possible, adding others, in order to insure the administration of justice from even the suspicion of being tainted, and thus maintain in the public mind a proper respect for law and justice, as administered by the Courts of the country. We therefore hold, that the facts presented by the affidavit in the record show that testimony went to the jury that might well have influenced them in coming to their conclusions, and seeing this, we cannot undertake nicely to weigh and ascertain the amount of influence such facts may have had, and for this cause the case must be reversed. We may add, that we treat the affidavit as the proper mode of bringing the facts before the Court, as in such a case, in no other way probably could the fact be developed, the deliberations of the jury under our system being secret.

We need not examine other questions presented, nor the question of the depositions not read, but taken out by the jury. Probably we might conclude this would have been an additional ground for reversal, but as such a thing is not likely to occur again, it is not necessary to decide the question.

Let the case be reversed and remanded for a new trial.

## E. M. JOHNSON \*v.\* A. G. HUNTER.

Jackson, June 2, 1877.

**QUIA TAM ACTIONS—PAUPERS OATH.**—*Quia tam* actions must be prosecuted with bond and security. The right to sue *in forma pauperis* is a personal right, not a privilege to be exercised in a representative capacity.—[Ed.]

CASES CITED.—3 Sneed 131, 203; Code §§ 1305, 3192.

DEADERICK, C. J., DELIVERED THE OPINION OF THE COURT,

This is a *quia tam* action for obstructing a navigable stream by building a dam across it.

The plaintiff instituted the suit in the Circuit Court of Dyer County by taking the *paupers* oath, and on motion the suit was dismissed upon the ground that he could not prosecute such a suit without giving bond with security.

Plaintiff has appealed to this Court, having given bond and security for his appeal.

The argument is made that the right to sue *in forma pauperis* is a personal right strictly, and that it is a privilege not to be exercised in any representative capacity.—3 Sneed 131; Ibid. 203, and that the suit in this case is brought in behalf of the State as well as in behalf of plaintiff.

It is true under §1305 of the Code one half of any recovery which may be had goes to the State, yet the suit is prosecuted by plaintiff alone, the State being no party thereto.

§3192 of Code authorizes any person on taking a prescribed oath to prosecute an action without giving security in all cases except for false imprisonment, malicious prosecution and slander.

In addition to these excepted cases, by reason of the statutory requirements in actions of replevin and in forcible entry and detainer in certain contingencies it has been held by this Court bonds and security are required. But the statutes and oath to be taken in prosecutions without giving security seem to contemplate a provision for the purpose of affording poor persons a means for enforcing their personal rights or redressing wrong or injury personal to themselves. The plaintiff in such a suit must swear that he "is justly entitled to the redress sought." Whereas the action brought in this case is for the use of the State in part at least and the object sought in addition to the recovery of the penalty is to punish the defendant for obstructing a public highway. So to the intent of one-half of the penalty to be recovered, and in punishment of the offender, the plaintiff is not personally interested more than any other citizen.

We are of opinion therefore that the statutes allowing suit to be brought, without security, enacted to give poor persons a right to redress their personal and individual wrongs, and to enforce such rights of a personal nature, pertaining to themselves as individuals, might be withheld.

The judgment of the Circuit Court was correct and will be affirmed.

### CITY OF MEMPHIS v. FISHER.

May 12, 1877.

**SPECIAL LEGISLATION.—UNCONSTITUTIONALITY OF.**—The act of the Legislature of 1875 authorizing the institution of suits in the State courts, by municipal corporations with a population of 35,000 or more, without giving bond for costs is repugnant to Art. XI, sec. 8 of the Constitution, which declares that the Legislature shall have "no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land," and is, therefore, void.

FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

By an Act of the Legislature of 1875 municipal corporations with a population of 35,000, or more, were authorized to institute suits either at law or in equity in any of the State Courts, without giving bond for costs, and also to prosecute appeals, writs of error, attachments, injunctions, etc., without giving security for costs.

In this case a motion was made to dismiss the appeal of Memphis under this Act.

*Held*, That while municipal corporations in some sense are public bodies having powers conferred on them appertaining to sovereignty, such as power to levy and collect taxes, yet in another aspect, as when they become suitors or are sued in courts, they stand as individuals. In this latter view municipal corporations must be governed by the general law and can have no "general law suspended for their benefit, nor any law passed for their benefit inconsistent with the general law of the land." Art. 11, sec. 8, Constitution of Tennessee. The Act of 1875 is repugnant to this section of the Constitution, and therefore void.

Motion sustained with cost.

## LEA v. CITY OF MEMPHIS.

May 5, 1877.

1. **TAX PAID BY REASON OF THREATS OF LITIGATION, ETC.—NOT RECOVERABLE.**—WHEN.—A tax paid by reason of threats of litigation or the apprehension of the levy of distress warrants, cannot on this ground be recovered, although the levy and tax was illegal, there being no fraud or mistake of facts, but only mistake as to legal liability. A State or city may and ought to refund a tax so paid.

CASES CITED:—Dill. on M. Corp., sec. 751; Cooley on Tax, sec. 531.

2. **A CITY IS CONTRACTING PARTY, AND NOT AGENT.**—WHEN.—In a matter of taxation the city is contracting party and not the agent of the tax payers.

CASE CITED.—20 Wall.

3. **CERTIFICATES OF INDEBTEDNESS.—ISSUED BY CITY.—VALID.—WHEN.**—A certificate of indebtedness issued by a city, upon its own ordinance, to individuals, who have paid illegal assessments, are valid and binding obligations against the city, and founded upon a valid consideration.

CASE CITED.—Nelson v. Town of Milford, 7 Pick., 18.

4. **CERTIFICATES OF INDEBTEDNESS.—ISSUED BY THE CITY OF MEMPHIS RECEIVABLE FOR TAXES.**—WHEN.—The certificates of indebtedness issued by the city of Memphis in 1873, were receivable for taxes on account of "Nicholson pavement" for the years 1873-74-75 from those who had paid the original assessment to Brown, but while this was so, a State court would not interfere with the special "mandamus tax" levied under the mandate of the U. S. Court, as this would be in effect to defeat the execution of the order of said court.—ED.

DEADERICK, J., DELIVERED THE OPINION OF THE COURT.

By an Act of the Legislature, in 1866, the city of Memphis was empowered to pave such streets as the Mayor and Aldermen might designate, the cost thereof to be assessed upon the property abutting on such streets, and to be a lien thereon.

By an ordinance the city prescribed a manner in which the city might contract for the pavement of certain streets, and how the assessments were to be collected of the property-owners, and afterwards made a contract with one T. E. Brown to pave said streets, which was done with Nicholson and stone pavements, and as the work progressed, bills were made out, certified to be correct by the city engineer, delivered to Brown, and by him presented to the property-holders for payment. Complainant being threatened with suit and distress warrants, paid large sums of money on his property to Brown in order to avoid litigation.

Afterwards in a contest between one Hart, a property-holder, and Brown, the Supreme Court decided that such assessments were illegal, and the Act of the Legislature and ordinances of the city authorizing the same unconstitutional and void.

Thereupon the Legislature empowered the city to levy a *general tax* to pay for this pavement, and further, to allow those who had paid their assessments credit for the same in the pay-

ment of said tax. In 1873 the city by ordinance empowered the Mayor to issue certificates of indebtedness to those who had paid the assessments mentioned above.

This ordinance made said certificates receivable at their full value and interest in payment of any tax thereafter levied by the city to cover the cost of said pavement.

In the meantime Brown had obtained a judgment in the U. S. Circuit Court for a large sum, and a mandamus had been issued to the city, and a tax of 70 cents had been levied to pay same. This tax was for the year 1873. In 1874 an additional tax of 30 cents was levied, all of which complainant was compelled to pay, notwithstanding he held the city's certificates of indebtedness, issued to him on account of the assessments paid to Brown, in amount greatly exceeding the amount of said tax.

The complainant alleged that the city was about to levy an additional tax for 1875; that the city was insolvent, and that the Legislature had repealed the statute authorizing the reimbursing tax, and that the complainant had tendered said certificates of indebtedness to pay the mandamus tax, which the city refused to receive.

Complainant asked that the city be enjoined from further claim for paying tax until the other tax-payers have paid their proportion of the same.

The city demurred to the bill setting up these facts; the demurrer was overruled, and the city appealed.

*Held*, That a tax paid by reason of threats of litigation or the apprehension of the levy of distress warrants cannot on this ground be recovered, although the levy and tax was illegal, and the statute authorizing same was unconstitutional, there being no fraud or mistake of fact, but only a mistake as to legal liability.—Dillon on M. Corp., Sec. 751, and notes. But while this is true, a State or city may and ought to refund a tax so paid.—Cooley on Taxation, Sec. 530. The city was itself the contracting party, and was not the agent of the tax-payers.—20 Wall.

The certificates of indebtedness issued by the city to complainant and others were valid and binding obligations against the city, and founded upon a valid consideration.—Nelson v. Town of Milford, 7 Pick. 18. The said certificates were receivable for taxes levied on account of said Nicholson pavement for the years 1873, 1874 and 1875, from those who had paid the original assessments to Brown; but while this was so a State Court would not interfere with the special mandamus tax levied under the mandate of the U. S. Court, as this would be in effect to de-

feat the execution of the order of said Court.

The complainant was entitled to an account to ascertain the amount of the city's indebtedness on account of the certificates issued to him by the city.

Decree overruling demurrer affirmed, cause remanded for answer and further proceedings. The city will pay the costs of this Court.

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### E. L. DAVENPORT *v.* JOHN HARBERT.

Jackson, May 12, 1877.

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**INJUNCTION BOND—DAMAGES ON—NOT ALLOWABLE—WHEN.**—Where a plaintiff is put in possession of property, in the character of a receiver, by the Court's fiat, granting an injunction, such party is not liable to damages upon the injunction bond, growing out of the destruction of said property, *without his fault*, pending the litigation; the injunction being issued with probable cause, his liability is such as the law imposes upon receivers, and yet his responsibility to damages, to some extent, in an action on the bond on the mere ground that the injunction was sued out without legal cause might be conceded. The Court hold, the defendant is entitled to the rental value of the house from the time of the injunction to the time of its destruction by fire, except for such time as defendant was in possession or received rents. Attorney's fees are not allowable.

CASE CITED.—2 Sneed 369.—Ed.

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TURNEY, J., DELIVERED THE OPINION OF THE COURT.

The rights of the parties to the house, the removal of which had been enjoined at the suit of complainant, were determined by decree of this Court in 1869 and the cause remanded for the ascertainment of the damages accruing to defendant by reason of the wrongful suing out of the injunction.

During the pendency of the suit the house, the value of which is the subject matter of this litigation, was burned without fault of either party.

It is now claimed the defendant is entitled to the value of the house at the date of the injunction, or, at least, at the time of its destruction by fire; that the condition of the injunction bond, that "complainant shall pay to said defendant such damages as shall be awarded to or recovered by him for the wrongful suing of the injunction," indemnifies against the loss, and must be held as the security for its reimbursement.

In this cause the complainant did not sue without probable cause; she certainly acted in good faith, though, as it was de-



terminated, "without sufficient legal cause and under a mistake of her legal rights."

There is no pretense that the fire occurred through fault or want of proper care on her part before any determination upon the merits of the bill.—2 Sneed 369.

The injunction retained the house in her possession, that possession was in the character of receiver under the fiat of the Chancellor. Then, according to Judge McKinney, in *Mosby v. Baker*, just cited, if this be correct, it follows that the obligations and liabilities of the complainant, resulting from her possession of the house as receiver, were only such as the law imposed upon her.

What liability she may have incurred antecedently, if any from the fact of having filed the bill and sued out an injunction under the circumstances without sufficient cause, is an inquiry not all important in the determination of the question whether upon the facts in this record she can be held liable for the value of the house in any form of proceeding upon the bond, for this may be denied and yet her responsibility to damages to some extent in an action on the bond on the mere ground that the injunction was sued out without legal cause might well enough be conceded:

In this connection the same judge cites authorities for the general principle that if a bond or other obligation be upon condition possible at the time when it is made, and afterwards becomes impossible by the act of God or of the law or of the obligee himself, the obligation will be saved. To which causes we add inevitable accident, or accident without fault or blame on the part of the obligor.

While cases may possibly be conceived of in which parties suing out injunctions might be held liable for the loss or destruction of the property, it is certainly not so in the case before us.

An examination of the article of lease of the lot on which the house was subsequently built, presents very plausible grounds for the institution of the suit—enough at least to show good faith in her claim of ownership by complainant.

It is next claimed defendant is entitled to recover solicitor's fees paid by him in defence to complainant's bill. We do not think so. Complainant had probable cause of action; the title to the house was at least doubtful, and to hold her responsible for fees to adversarie's counsel would be to establish precedents under which all successful defendants might claim reimbursement for fees paid their attorneys.

Defendant is entitled to the rental value of the house from the

time of the injunction to the time of its destruction by fire, except for such time as defendant was in possession or received rents.

The decree of the Chancellor is reversed. The clerk of this court will state the account as indicated.

## General Legal Information.

[This Department is conducted by JAMES C. BRADFORD, of the Nashville Bar.]

List of Journals from which Abstracts are taken :

NAME.	ABBREVIATION.	ADDRESS.	PUBLISHED.	PRICE.
Albany Law Journal	Alb. L. J.	Albany, N. Y.	Weekly.	15 cents.
American Law Record.	Am. L. Rec.	Philadelphia Pa.	Monthly,	50 cents.
Central Law Journal.	C. L. J.	St. Louis, Mo.	Weekly.	50 cents.
Chicago Legal News.	C. L. N.	Chicago, Ill.	Weekly.	10 cents.
Weekly Notes of Cases.	W. N. C.	Philadelphia, Pa.	Weekly.	20 cents.
Western Jurist.	West. Jur.	Des Moines, Ia.	Monthly.	50 cents.
The Law and Equity Reporter.	L. & E. R.	New York, N. Y.	Weekly.	15 cents.
Washington Law Reporter.	Wash. L. R.	Washington, D.C.	Weekly.	10 cents.

IN reference to the case of Anthony v The State, published in our August number, the following letter of the Attorney-General will make explanation, for having published the dissenting opinion unaccompanied by the opinion of the majority of the court.—  
Ed.

*Jere Baxter, Esq.:*

DEAR SIR.—I owe you an apology for having sent you without explanation the dissenting opinion in the Anthony case. The opinion of the majority was oral, holding that the fee charged by the magistrate was not allowable. What you have published is the dissent of two of the judges. Please correct the error in your next. Yours,

J. B. HEISKELL.

Memphis, Aug. 21, 1877.

### BOOK NOTICES.

The *Monthly Jurist*, a legal periodical published at Bloomington Ill., and Indianapolis, Ind., is among our exchanges for August. Judging from the number before us, we unhesitatingly pronounce it one of the best legal journals of the country. The cases are selected with care, and are well re-

ported. It supplies the wants of the busy lawyer and over-worked judge; and merits an extensive patronage.

We have received from Robert Clarke & Co., of Cincinnati, their *Digest of Law Publications*, which is a complete catalogue of American and British Law Books, classified according to their recognized legal titles. The design of the book is admirable, and supplies a want long felt by the profession. It is a hand-book to which a lawyer can instantly turn and find any book on any subject, and thus saves valuable time. The book merits a favorable reception. Price, 25 cents.

### ABSTRACTS.

**AGENCY. Liability of Agent.** When an agent duly authorized acts for another, who is named, in a matter in which he (the agent) has no personal interest, he is not liable. *Teele v. Otis*, Sup. Ct. Maine, L. & E. R., July 11, 1877.

**Authority of Public and Private Agents Distinguished.** Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. As to the latter, the principals are in many cases bound where they have not authorized the declarations and representations to be made. But in cases of public agents, the government or other public authority is not bound, unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having the authority to do the act, or is employed in his capacity as public agent to make the declarations or representations for the government: *Bouton et al. v. Board of Supervisors*, Sup. Ct. Ill.; Cent. L. J., Aug. 3, 1877.

**ATTORNEY. Authority to Endorse Client's Name.** A general power of attorney to prosecute a claim, with authority to settle the claim and receive any check or order issued for the payment thereof, does not confer upon the attorney the power to endorse the instrument and receive the money thereon; and a bank upon which such a check or order is drawn, if it pay over the money upon such indorsement, is liable to the payee for the amount thereof. *Millard v. Nat. Bank of the Republic*, Sup. Ct. D. C., Wash. L. R., July 10, 1877.

**Lien of.** An attorney, before judgment, has no lien which will defeat a settlement made by the parties. *Averill v. Sup. Ct. Maine*, L. & E. R., July 4, 1877.

**BANKRUPTCY. Fraudulent Preference.** A priority, secured by the levy of an execution issued from a judgment, obtained upon a note, executed by an insolvent debtor to a creditor who knew of his insolvent condition, containing a warrant of attorney to confess judgment, is fraudulent as

to other creditors, and will be set aside. *In re Herpich*, U. S. Cir. Ct., S. D. Ill., L. & E. R., July 11, 1877.

**CONTRACT. Priority Between the Contracting Parties.** The defendant contracted with the Citizens' Ice Co. to supply him with ice. This company sold its business to the plaintiffs, the Boston Ice Co., with the privilege of supplying its customers with ice. The plaintiff supplied the defendant with the amount of ice he had contracted for, but did not notify him that it was delivering the ice until all had been delivered. *Held*, that the action could not be supported, because there was no privity of contract between the plaintiff and defendant. *Boston Ice Co. v. Potter*, Sup. Ct. Mass., L. & E. R., July 18, 1877.

**Railroad.—Breach of Contract.—Ground of Damages.** In an action for breach of contract against a railroad company for failing to provide means of return from an excursion trip, it is held that annoyances of mind, mutual distress, and sense of wrong, caused by the breach of the contract, are not the subject of damages. *Walsh v. Milow & St. P. R. R. Co.*, Sup. Ct. Wis., L. & E. R., July 4, 1877.

**DOWER. Relinquishment of Dower.** An ante-nuptial agreement by which a woman in contemplation of marriage, and without any other consideration except the intended marriage, relinquished her right of dower in certain lands of the intended husband, is contrary to public policy and void. *Curry v. Curry*, Sup. Ct. N. Y., Wash. L. R., July 30, 1877.

**EASEMENTS. Ancient Lights.** The principle of the Common Law, that the right to the easement of light and air passing over another's land through ancient windows, may be acquired by possession and use, is not applicable to this country, and is rejected by the

current of American authority. *Turner v. Thompson*, Sup. Ct. Ga., L. & E. R., July 4, 1877.

**EVIDENCES.—Ambiguity in a Deed.**

**—Extrinsic Evidence.** Where the description of a deed applies with exactness to either one of two pieces of property, extrinsic evidence is admissible to explain the ambiguity, *Eisher v. Quackenbush*, Sup. Ct. Ill., L. & E. R. Aug. 1, 1877.

**GARNISHMENT. Salaries of Public Officers not Subject to.** The salaries of the officers and the pay of the employees of the State are not subject to any judicial process at the instance of creditors. *Simpson v. Turner*, Sup. Ct. N. C., L. & E. R., July 11, 1877.

**INFANCY. Ratification of Contract.**

An affirmance or ratification of a debt contracted during infancy, can only be shown by unequivocal acts done, after coming of age, which clearly manifests an intention to pay. *Toney v. Wood et al.*, Sup. Ct. Mass., Wash. L. R., July 30, 1877.

**INSURANCE. Warrant. Breach of.**

The application for insurance is a part of the policy: the answers therein amount to a warranty. If they are untrue, they constitute a breach which avoids the policy. *Ins. Co. v. Yates*, Sup. Ct. Va., L. E. R., July 11, 1877.

**Verbal Agreement of Agent. Estopped.** When the verbal agreement of an agent is recognized and acted upon by an insurance company in such manner as to mislead the assured, and cause a failure on his part to fulfill the conditions of the policy, the company is estopped from setting up a forfeiture under the terms of the policy for non-performance of the conditions. *Globe Mut. Ins. Co. v. Johns, Exr.*, Sup. Ct. Pa. W. N. of C., June 21, 1877.

**Life Insurance. Insurable Interest.**

A person who has no interest in an-

other's life, cannot purchase or take by assignment an insurance policy on such life. *Missouri Valley Ins. Co. v. Sturges*, Sup. Ct. Kansas, L. & E. R., July 4, 1877.

**JUDGMENTS. Judgments of Other States. Degree of Faith and Credit to be Given.** The clause of the Constitution of the United States which provides that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, does not include judgments and decrees which show upon their face that the court rendering them had no jurisdiction. *Hood v. Sup. Ct. Ind., Cent. L. J.*, July 13, 1877.

**JURISDICTION. Of Non-Residents.**

Jurisdiction can only be acquired of a non-resident by proceeding against the property of such non-resident within the jurisdiction of the court, and, in such case, the defendant is not personally bound by the judgment beyond the property in question. *Harris v. Pullman*, Sup. Ct. Ill., Ch. L. N., July 14, 1877.

**LUNACY. Execution of Deed by Lunatic.** A deed executed by a party charged to be a lunatic, will not be set aside when it appears that the transaction was fair and *bonà fide*, and the grantor appeared to be of sound mind and was not known to the grantee to be otherwise, and the property conveyed cannot be restored so as to put the parties in *statue quo*. *Scanlon v. Cobb*, Sup. Ct. Ill., L. & E. R., July 18, 1877.

**LANDLORD AND TENANT. Waiver of Forfeiture. What Constitutes.** A landlord who sees a tenant making expenditures in altering premises in violation of his lease, must make a reasonable objection or he will waive the forfeiture. *Malley v. Thalheimer*, Sup. Ct. Con., L. & E. R., July 18, 1877.

**MORTGAGE. Liability of Vendee of Mortgagor for Mortgage.—Debt.—Promise to Pay.** The owner of premises executed a mortgage on the same, and thereafter conveyed them to a grantee who did not assume the payment thereof. Through several meane conveyances, the grantees in none of which assumed the payment of the mortgage, the property was conveyed to the defendant. In the deed to the defendant was a clause whereby she assumed payment of the mortgage. *Held*, that the holder of the mortgage was not entitled to the benefit of the defendant's agreement, and she was not liable for a deficiency upon a sale under the foreclosure of the mortgage. *Vrooman v. Turner*, N. Y. Ct. of Ap., Alb. L. J., June 7, 1877.

**Mortgagee's Right of Possession.** A mortgagee has the right of immediate possession of the mortgaged premises unless it is otherwise agreed between him and the mortgagor, and may enter and harvest the crop growing upon the land; and an action of trespass cannot be maintained against him for so doing. *Gilman v. Wells*, Sup. Ct. Maine, L. & E. R., July 4, 1877.

**No Action will lie for Entering.** An action will not lie by a mortgagor against his mortgagee for entering and harvesting the crops, unless the mortgagor is occupying under an agreement as a tenant of the mortgagee. *Ibid.*

**Attachment by Mortgagee.—Waiver.** An attachment by the mortgagee is a waiver of the claim under the mortgage. *Evans v. Warren*, Sup. Ct. of Mass. L. & E. R., July 4, 1877.

**PROMISSORY NOTES. Fraud in Making Note.—Liability of Maker.** In an action against the maker of a negotiable promissory note, by the holder thereof, who had purchased the same for a valuable consideration before maturity, without notice of any fraud or infirmity as between the original

parties, the defendant is not liable where it is shown:

1. That at the time of signing and delivering the note he was induced by fraudulent representations as to the character of the paper to believe that he was signing and delivering an instrument other than a promissory note.

2. That his ignorance of the true character of the paper was not attributable, in whole or in part, to his own negligence of the premises. *DeCamp v. Hamma*, Sup. Ct. Ohio, Wash. L. R., July 30, 1877.

**New Party to the Note.—Liability of.** If, after the maturity of a note, a new party sign it as surety for the original matter, and a new stipulation be introduced increasing the rate of interest, no time of payment being expressed, the *prima facie* import of the instrument then is that it is payable immediately, and that the surety as well as the principal is bound for the whole debt. *Rodgers v. Rosser*, Sup. Ct. Ga., L. & E. R., July 11, 1877.

An indorser of a promissory note is a competent witness to prove an agreement in writing made with its holder at the time of his indorsement, that he shall not be held liable thereon, where the paper has not afterwards been put into circulation, but is held by the party to whom the indorsement was made. *Davis v. Brown*, Sup. Ct. U. S., Ch. L. N., July 21, 1877.

**Note Dishonored.** Where the interest of a note is past due and unpaid, the note is so far dishonored as to place the purchasers on their guard as to defences. *Hart v. Stickney*, Sup. Ct. Wisc., L. & E. R., Aug. 1, 1877.

# THE Tennessee Legal Reporter.

NEW SERIES.

DECISIONS OF THE SUPREME COURT,

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VOL. I NASHVILLE, TENN., OCTOBER, 1877. No. 6.

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ANNIE L. JONES *et al.* v. D. H. TOWNSEND.

AND

D. H. TOWNSEND v. ANNIE L. JONES *et al.*

Jackson, December 2, 1876.

**EXECUTION—VARIANCE IN RECITALS—DOES NOT AVOID SALE—WHEN.**—An execution issuing upon a judgment, and conforming to it in all essential respects, a variance of the initial letter of the middle name in the execution from that in the judgment is not so material as to render a sale under it void.

**EXECUTION SALE—DIVISION OF THE LAND.**—In a sale of land by execution it is not the duty of the Sheriff, nor has he the right himself, to divide the land and sell it in parcels, no matter what the amount of the debt, or the value or amount of land levied upon. It is otherwise where the levy is upon two or more distinct lots of land.

**IN VIEW OF THE CODE.**—Sections 2154, 3043, giving to the defendant the right to divide his land and cause a sale by plat, the rule as laid down in *Tiernau v. Wilson*, 6 John. Ch. R. 411, has no application in Tennessee.

**FINAL DECREE—APPEAL.**—A decree of July 18th, 1871, declared complainants' right to redeem by tender of the money under an amended bill to be

thereafter filed; the penalty for a failure to do so within thirty days thereafter being a dismissal of the case out of Court, each party to pay his own costs. A decree of March 5th, 1872, under the amended bill, finally determined the rights of the parties. An appeal from this decree carried up the whole case and all questions involved in it.

CASES CITED.—*Tiernan v. Wilson*, 6 John. Ch. R. 411; 6 Cold. 528; Code, §§ 2154, 3043.—*Ed.*

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DEADERICK, C. J., DELIVERED THE OPINION OF THE COURT.

The complainants in the original bill are the widow and heirs at law of W. E. Jones, deceased, and file their bill in the Chancery Court at Memphis, asserting their title to, and to stay waste upon, a tract of 640 acres of land in Shelby County.

It appears that W. E. Jones purchased at a sale under proceedings by the Chancery Court at Nashville, on an execution issued therefrom, the tract of land in question in 1865, in the suit of the Ohio Life Insurance and Trust Company v. Daniel B. Turner, the then owner of the land; that he took a deed from the Sheriff for said tract of land and entered upon the possession thereof some time during the year 1865. It further appears that in June, 1866, Townsend obtained a judgment against Jones in the Circuit Court of Shelby County for about \$1,200, and that execution thereon was issued and levied upon said tract of land as the property of said Jones, and was sold on the 12th of September, 1866, Townsend becoming the purchaser at \$1,242.97. He obtained a deed from the Sheriff. The time allowed by law for redemption having expired, and Jones having died after the sale and before the time of redemption expired, and no one offering to redeem, Townsend entered into possession of part of the land. After the purchase by Townsend dower was assigned to Annie L., the widow of said W. E. Jones, and Townsend, since the filing of the original bill, bought her dower interest in the land. The original bill sought to set aside the purchase by Townsend upon the ground alleged—that the Sheriff had not given Jones the twenty days notice required by law. The amended bill, insisting upon this ground, assigns and charges several other reasons why the sale to Townsend is invalid and should be set aside:

1. Because on the 20th of November, 1865, Wm. E. Jones conveyed to Wm. H. Stovall 100 acres of said tract in trust to secure Wright & McKissick against a certain liability they had assumed for him, and this 100 acres was not conveyed to Jones until the 2nd of October, 1866, and after the sale to Townsend, and it is insisted that this 100 acres could not be levied upon or sold by execution.



2. It is charged that although the sale of said land by the Ohio Life Insurance and Trust Company, in the suit against Daniel B. Turner, was regular and in due form, yet the said Wm. E. Jones, the purchaser, acquired only the equitable title in fee simple to the said land, and that the Sheriff's deed therefor does not convey the legal title, because said deed describes the judgment and execution as being against David B. Turner instead of Daniel B. Turner, the true name of the defendant therein; that although the judgment was rendered and the execution issued against said Turner by his true name, Daniel B., yet, by mistake or other cause, the Sheriff's deed describes the execution and judgment as against David B. Turner.

3. It is further charged that the suit and judgment against Jones, in favor of D. H. Townsend, were prosecuted and rendered in his true name, but that the execution, not pursuing the judgment, was issued in the name of D. E. Townsend.

4. It is further charged that the sale was void, because the land was divided by natural and artificial lines into several distinct lots, any one of which was of value sufficient to more than satisfy the judgment in favor of defendant, and that the whole tract was worth \$65,000, and that it was the duty of the Sheriff to sell no more than was sufficient to satisfy the debt and costs, amounting to about \$1,242.

His honor, the special Chancellor, decreed that complainants were entitled to be relieved of the great hardship of losing the tract of land worth from \$30,000 to \$50,000 for the grossly inadequate sum of \$1,242.97 bid for it by Townsend, the purchaser, and that it was naturally susceptible of division and should have been divided. But the Chancellor was of opinion, and so decreed, that Townsend was entitled to his debt, interest and costs, and to have the same declared a lien upon the land, and that complainant should tender the same in Court and allowed them thirty days within which to file an amended bill to bring the money due said Townsend into Court, and that upon filing said amended bill and making said tender complainants right to redeem shall become fixed and their right to said land established. If the complainants should not elect to amend their bill and tender the money into Court within thirty days from the date of the decree; then the Chancellor directed that the bill and cross-bill stand dismissed without prejudice to either party, each party paying his own costs. This decree was rendered on the 18th of July, 1871, and no appeal was prosecuted therefrom, and on the 14th of August, 1871, complainants filed their

amended bill, averring that they had made a tender of the amount due personally to Townsend and that he had refused to accept it, and bringing the money into Court. Townsend answered the amended bill on the 18th of November, 1871, raising some questions as to the regularity and sufficiency of the alleged tender, and charging a champertous arrangement or contract by complainants, with others. Upon these issues depositions were taken, and on the 5th of March, 1872, a final decree was rendered adjudging that the tender had been made to Townsend of the money due him, and had been brought into Court for his benefit, and that complainants were entitled to be invested with the title to said land and to writs of possession thereof, except the dower tract, and decreed accordingly, and directed an account for waste and permanent improvements, etc., and defendant, Townsend, appealed to this Court.

The deposition of the deputy Sheriff who made the sale to Townsend is taken, and satisfactorily establishes that the twenty days notice, required by statute, was given by him personally to Jones.

The conveyance of 100 acres in trust to Stovall, made on the 20th of November, 1865, was made to indemnify Wright & McKissick against liability as acceptors of an accommodation bill drawn on them by Jones at ninety days. The bill was not presented or protested at maturity, and the trust deed stipulates that Wright & McKissick should select out of the 640 acres from any portion thereof, except the houses and cleared land, 100 acres, and have the same surveyed, and a plat thereof, with the metes and bounds, furnished to the said Wm. H. Stovall, and when said 100 acres are so selected, ascertained and set apart, the said Wm. H. Stovall shall hold to him and his heirs, etc., and provides that upon paying said bill and saving his acceptor's harmless, the deed shall be null and void. No survey was made or metes or bounds furnished the trustee, nor did the beneficiaries ever select any 100 acres out of the 640 acres, and it can not be said that any particular 100 acres ever vested in the trustee; on the contrary, by the terms of the deed, the trustee was to hold to him and his heirs only when the 100 acres was selected, surveyed, set apart, etc., and until that was done the effect of the deed was simply to confer on the trustee the power to hold, etc., when the selection, etc., was made.

The objections taken, that the mistake in the Christian name of Turner in the recital of the Sheriff's deed to Jones, and the mistake in the initial letter of the middle name of Townsend in

the execution issued on his judgment are of such character as to prevent Townsend from acquiring the legal title by his purchase and Sheriff's deed are not tenable. It is distinctly charged in the original bill, filed by complainants on behalf of themselves and the creditors of the estate of said Wm. E. Jones, that said Wm. E. Jones was at the time of his death the owner of said tract of 640 acres, and died seized thereof, and that said Wm. E. Jones at the date of Townsend's judgment, the issuance and levy of the execution thereunder, was in the actual possession and occupation of said land, and that the officer did not advertise and give the twenty days notice required by law. In their amended bill the complainants, in disparagement of their own title, as set up and claimed in the original bill, seek to avoid the effect of the levy on and sale of the land, and insist that although the sale of the land and purchase by said Wm. E. Jones was all regular, yet because of the mis-recital of Turner's Christian name in the Sheriff's deed to Jones he did not acquire the legal title thereto but only an equitable title, not subject to sale upon an execution at law. Upon the record we are by no means satisfied that any such mis-recital occurred in the deed executed by the Sheriff; on the contrary, we are inclined to the opinion that it did not, but that the substitution of the name David for that of Daniel occurred by clerical mistake in the registration of the deed. The difference in the appearance of the two names, when hastily or indistinctly written, is so small that such a mistake might easily be made by a copyist. A similar objection is made to the execution issued upon Townsend's judgment against Jones. This execution conforms in all respects to the judgment in favor of D. H. Townsend, and the execution is in favor of D. E. Townsend. There is no doubt that this execution issued upon a judgment regular in all respects, and conforms to it in all essential particulars, and the variance in the initial letter of the middle name is not so material as to render the sale under it void. The special Chancellor held in conformity to this opinion upon the several questions herein before discussed, and we are of opinion that his holding was correct. But the Chancellor further held that the land being susceptible, by well defined natural and artificial boundaries of division, that it was the duty of the Sheriff to have sold it in lots, as so divided, and that complainants were entitled to be relieved of the great hardship of losing the land worth \$30,000 to \$50,000 for the grossly inadequate sum of \$1,242.97, bid for it by Townsend. From said holding, notwithstanding the apparent hardship of the case, we feel constrained

to differ. The case of *Tiernan v. Wilson*, 6 John. Ch. R. 411, is cited and relied upon as sustaining the holding of the Chancellor. In that case the Sheriff sold together two distinct lots upon an execution for \$10.25 for \$13. The lots were worth \$780. The sale was set aside as fraudulent and void. In the opinion of the learned Chancellor, it is said, "the proposition is not to be disputed, that a Sheriff ought not to sell, at one time, more of the defendant's property than a sound judgment would dictate to be sufficient to satisfy the demand, provided the part selected can be conveniently and reasonably detached from the residue of the property and sold separately." Whether the proposition was laid down in view of any statutory provision does not appear from the opinion. But in view of the provisions of our statutes we are of opinion that the rule can have no application in Tennessee, so far as it is understood as requiring the Sheriff to separate for sale a portion of an entire tract. This Court has held that it is a fraud upon the right of redemption to sell together two or more distinct lots of land, and that such sale is void.—6 Cold. 528. But Code, §§ 2154 and 3043, gives the right to the defendant in the execution to divide his tract of land at any time before 10 o'clock, A. M., of the day of sale by delivering a plan of such division, subscribed by him, and in such case it is the duty of the Sheriff to sell according to such plan. If no such plan is furnished it is the duty of the Sheriff to sell without division. He has no right, much less is it his duty to divide the lands, no matter what the amount of the debt or the value of the land levied upon. The debtor's security against the sacrifice of his property depends upon his vigilance in availing himself of his right of redemption, which the law gives him for the period of two years after the execution sale.

It is further insisted that Townsend having failed to prosecute his appeal when the decree of July 18th, 1871, was pronounced, can not, upon his appeal in March, 1872, now inquire into the questions determined by the decree of July 18th, 1871. While we hold that the defendant, Townsend, might, by leave of the Court, have appealed from that decree, he was not bound to do so. That decree had directed that if certain things were not done within thirty days by complainants their bill should be dismissed, and the defendant might wait to see and contest the fact of performance of the acts required to be done. The decree of 1871 did declare complainants right to redeem and adjudge the costs of the cause, but the decree of the March term, 1872, divested and vested title, and determined finally the respective

rights of the parties, and was the last, the final decree in the cause, from which either party had the right to appeal, and the appeal by Townsend brought the whole case, and all the questions involved in it, to this Court for revision. The Chancellor's decree, giving complainants the right to redeem, must be reversed, and complainants bill dismissed with costs.

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CONNELL *et al.* v. McKENNA *et al.*

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Jackson, December 12, 1877.

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**RULE FOR CONSTRUCTION OF WILL.**—The intention of a testator is to be ascertained not by subtle or artificial rules of construction but by the *will itself*, upon the most easy, reasonable and natural reading of its terms as reflecting the intention of the testator.

**DEVISE TO A CLASS.**—Where the will directed that "after the death of my wife I desire my executors to take charge of my estate and divide it equally among my children, and those of my children who are dead at the time, I wish their children to represent their parents and take their share of my estate," it is held, that these words vest the remainder in the children or grand-children living at the termination of the life estate *as a class*, and not in severalty.

**EXTENT OF WIDOW'S ESTATE.**—It is also held upon a proper construction of the will that the estate of the widow was not absolute, but was only usufructuary for her life to the extent of all the products and profits thereof.

**CASES CITED.**—1 Jarne. Wills 295; 1 Roper Leg. 71, et seq.; Satterfield v. Mays, 11 Hump. 58; Womack v. Smith, 11 Hump. 483; Beasley v. Jenkins, 2 Head. 192; Fulkerson v. Bullard, 3 Sneed 260; 1 Redf. Wills 385; Knight v. Knight, 3 Jones Eq. 167; 2 Redf. Wills 330; Parrish v. Groomes, 1 Tenn. Ch. R. 581; Puryear v. Edmondson, 4 Helsk. 54.—[Ed.]

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SNEED, J., DELIVERED THE OPINION OF THE COURT.

The questions involved in this case have been so often and so thoroughly discussed in our adjudged cases that it is scarcely necessary to do more than state our conclusions.

The original bill was brought by the heirs and devisees of the late Eppy White for a partition of his estate, and for other purposes, and the main questions in controversy depend for their solution upon the proper construction of his will. He died in 1857, leaving a widow and seven children surviving him. The widow was left in possession of the real and personal estate of the testator under provisions of the will herein to be considered and construed. She intermarried with the defendant, Robert Mc-

McKenna, and they lived at the testator's late homestead in Shelby County until her death in 1873. The defendant, McKenna, has since intermarried with Anna Blackstone, a grand-daughter of the testator, who is also a defendant herein, and who, with her said husband, consents to the partition claimed by the complainants. The complainants are the grand-children of Eppy White, the testator, all his children being dead. The complainant, Owens, and others, are the children and heirs of Mary A. Owens, formerly Mary A. White, a daughter of the testator. Mrs. Owens died after her father, but during the lifetime of her mother.

The complainants, her children, claims her interest in the estate, while on the other hand the complainants, in the cross-bill of Galloway and others claim, Mrs. Owen's interest under a sale and assignment by her in her lifetime to one Cato, from whom they claim to have purchased. The defendant, Mrs. Hawley, was the wife of O. L. White, a son of the testator, and of this marriage a son was born, who died as did his father, also after the death of the testator, but during the lifetime of the testator's widow. The defendant claims an interest in the estate by inheritance from her said deceased son. It is claimed by complainants that their grand-mother was only entitled, under the will, to support out of the testator's estate and not to a life estate or other estate that would entitle her husband, McKenna, to hold and enjoy the rents and profits thereof, and they therefore demand an account thereof against him. The effect of the Chancellor's ruling upon the demurrer interposed by defendant, McKenna, was, that under the will the children of Eppy White living at the time of his death and the children of those who were then dead, took vested remainder in severalty in the estate at his death, and, as a consequence, that Mrs. Owen's sale of her interest was a valid disposition thereof to her assignees, and that Mrs. Hawley took, by inheritance, her son's interest—it being one-seventh share in the estate. That the testator's widow took an absolute estate in the personalty and a life estate in the land, and hence complainants were not entitled to the account for rents and profits against the defendant, McKenna. These points were adjudged upon demurrer and the case has been brought here by appeal upon these preliminary questions and submitted for decision out of its order upon full argument, that the settlement of the estate may not be delayed.

The clauses of the will material to be considered are as follows: After other provisions, not relevant in this controversy, the third clause of the will is in these words: "I desire that

the remainder of my estate, both real and personal, be kept together for the maintainance and support of my beloved wife, Martha White, during her natural life. 4th. *After the death of my said wife* I desire my executors to take charge of my estate and divide it equally amongst my children, taking into consideration the advances I have made to each, of which I will speak below, and those of my children who are dead at *the time* I wish their children to represent their parents and take their parents' share of my estate. 5th. I earnestly desire and request my executors, in whose honesty and integrity I have the greatest confidence, to aid and assist my wife in the management of my estate during her life, to buy or to sell any thing on the place as they may see proper, and after her death I wish them to use their own discretion as to the time when they will sell or divide my estate, and I hereby authorize and empower them to keep up my plantation if, in their opinion, it should not be a favorable time for selling at the time of the death of my wife; to keep it up for a term of years if they see proper; to buy and sell any thing that may be necessary until a more favorable time arrives for selling and dividing the whole."

As we have seen, the testator had seven children, one son and six daughters, living at the time of the preparation of the will, in 1853. These children are named in a subsequent clause of the will in connection with his directions to the executors as to the collation of advancements. At the time of the filing of this bill, on the 10th of April, 1874, not one of these children were living. What interest did these children take under the will? Was it a vested interest in remainder, taking effect at testator's death in severalty, or is the testamentary disposition to a class of persons who may answer the description in the will at the time of the widow's death? The question is to be determined by no subtle or artificial rules of construction but by the *will itself*, upon the most easy, reasonable and natural reading of its terms as reflecting the intention of the testator. He has unquestionably grouped the objects of his bounty into a specific class, but did he intend to vest the estate in severalty at his death to be enjoyed in the future, and after the death of his widow? We find in looking to the third clause of the will that he has settled what we will at present call the usufruct of the estate, both real and personal, upon his widow for life. What character of estate this was we will enquire hereafter. By the fourth clause he instructs his executors, "after the death of his wife, to take charge of his estate and divide it equally among

his children, and those of his children who are dead *at the time*, he wishes their children to represent their parents and take their parents' share of the estate."

We have a number of adjudged cases holding that where a bequest is made to a class of persons subject to fluctuations by increase or diminution of its number in consequence of future births or deaths and the time of payment or distribution of the fund is fixed at a subsequent period or on the happening of a future event, the entire interest vests in such persons only as at the time fall within the description of persons or constitute such class.—1 Jarne. Wills 295; 1 Roper Leg. 71, et seq.; Satterfield v. Mays, 11 Hump. 58; Womack v. Smith, 11 Hump. 483; Beasley v. Jenkins, 2 Head. 192; Fulkerson v. Bullard, 3 Sneed 260. The presumption is in favor of the estates vesting *in presenti* and yield only to a manifest contrary intention to be found in the will. It is thus stated in the text-books. If the bequest be to a class, all who are embraced in the class at the time the bequest takes effect, will be allowed to take. And as an interest devised under a will ordinarily takes effect at the death of the testator, unless some other time be appointed for it to come into operation, it will be so regarded, and the class ascertained as of that time. But where there is an intermediate estate the class is to be determined at the time the estate vests in such class in possession.—1 Redf. Wills 385; Knight v. Knight, 3 Jones Eq. 167; 2 Redf. Wills 330; Parrish v. Groomes, 1 Tenn. Ch. R. 581; Puryear v. Edmondson, 4 Heisk. 54.

The language of the will is, "after the death of my wife I desire my executors to take charge of my estate and divide it equally among my children, and those of my children who are dead at the time I wish their children to represent their parents and take their share of my estate." We hold that these words vest the remainder in the children or grand-children living at the termination of the life estate as a class and not in severalty, and it results that Mrs. Hawley takes no interest—her son, from whom she claimed the inheritance, having died before the widow, and that Mrs. Owen could only dispose of her defeasible interest dependent as her own survivorship of her mother. Her children, therefore, who are the grand-children of the testator, take her share in preference to the purchasers under her.

In regard to the widow's interest in the estate of her husband, the testator, the Court is of opinion that under the will she did not take an absolute estate in the personalty or a technical life



estate in the realty, but the usufruct of both to the extent of all products and profits thereof.

It is manifest from the injunctions upon the executors, "to keep the estate together" for the support and maintainance of his wife during life and the executory bequest to the class of persons in whose favor he creates the trust in said executors, that he contemplated no absolute right of disposition of the personalty in his widow, but we think the whole profits, products and usufruct of both personalty and realty belonged to the widow under the will. He invests the executors and not the widow with the right "to buy or to sell any thing on the place," and enjoins it upon them to assist her in the management of his estate. Having first carried out an ample support and maintainance for her, under the auspices of his executors, in the rents, profits and product of the estate, the prevailing idea of the will is, that the estate should be managed with such skill and prudence as to result to the best advantage of those who were to take the estate after the widow's death, but without any restriction upon the widow as to the use and enjoyment of the products of the estate. This is plainly apparent from the large discretion lodged in the executors by the fifth clause of the will, as to the time and circumstances under which they are to divide the estate after the termination of the widow's interest. A bequest to trustees for the maintainance and support of a widow, with an injunction upon them to keep the estate together to assist her in its management, and to buy and sell of the personalty when necessary, can in no manner be construed into an absolute estate in the widow in the personal estate or a life estate, in its proper sense in the realty. In the case in judgment, the bequest is not directly to the widow, but a trust in her behalf is reposed in the executors, which, we think, is plainly significant of the testator's intention in the matter. She may manage the estate under their advice and assistance, and they, and not the widow, may buy and sell as may be necessary to keep up the estate. We hold that the widow has no absolute right of disposition of the personalty, and hence that she was entitled to the use and occupation of the real estate for life, as aforesaid, to the extent of all the rents and profits of the whole estate. The estate will be distributed according to the principles of this opinion. The right of the parties to an account against the defendant, McKenna, if they have any, will depend upon the rights he acquired under the marital relation—they being none other or greater over the property than those of the testator's widow, who became the said defend-

ant's wife. If he has been guilty of waste he would be liable to account to the complainants.

It results, in the opinion of the Court, that the decree of the Chancellor must be modified as herein indicated.

By an agreement of the parties of record, the costs of this appeal will be adjudged against defendant, McKenna, as administrator, with the will annexed, which will be adjusted in his settlement. Let the decree be modified accordingly, and the cause remanded.

R. D. FRAZER, *Trustee*, v. JEMIMA HIGHTOWER  
and others.

Jackson, April Term, 1873.

HUSBAND AND WIFE—CURTESY IN SEPARATE ESTATE—EXISTS—WHEN.—Real and personal property was conveyed by a husband to a trustee for the benefit of his wife, in the following language: "The trustee is to hold the same for the sole and separate use, behoof and benefit of her, her heirs and assigns forever, free from the debts, contracts or control of her husband; and the said trustee shall permit her, her heirs and assigns to have the occupation, possession and enjoyment of the aforesaid real and personal property and receive the rents and profits of the same, etc." The wife dying first, there being birth of issue, the Court hold, that inasmuch as this deed makes no settlement of the land in the event of the wife's death, and provides only for the dominion and control of it during her coverture, that he has abridged his estate by his deed for that period only, and that having survived her, he is entitled, as tenant, by the curtesy.

CASES CITED —Baker v. Heskett, 1 Cold. 641; Morgan v. Morgan, 5 Mad. 480.—[ED.]

BURTON, SPECIAL JUDGE, DELIVERED THE OPINION OF THE COURT.

On the 21st of September, 1855, Daniel Hightower conveyed in trust certain real estate and slaves to one T. B. Thrall to hold in trust for the benefit of Jemima Hightower, the wife of the bargainor. The considerations moving him to make the conveyance, as set out quite at length in the deed, are that he was about to leave the State for an indefinite length of time, and his death during his absence being contemplated, he was desirous to secure to his wife the possession, control and enjoyment of all his property, of every description, in the city of Memphis and State of Tennessee, which was acquired by their joint exertions.

The further considerations expressed were love and affection, the nominal consideration of ten dollars, and that the said Jemima had assumed to pay two hundred dollars of the debts of the bargainor. The trustee was to hold the same (the bargained premises) for the sole and separate use, behoof and benefit of her, the said Jemima Hightower, her heirs and assigns forever, free from the debts, contracts or control of her husband, the aforesaid Daniel, and the said trustee shall permit the said Jemima, her heirs and assigns, to have the occupation, possession and enjoyment of all the aforesaid real and personal property, and receive the rents and profits of the same, etc.

The said Jemima Hightower is dead, leaving her husband, Daniel, surviving. The sole question submitted to us on an agreed state of facts is this: Is Daniel Hightower entitled, as tenant, by the courtesy, to a life estate in the lands conveyed in the aforesaid deed of trust? The marriage, birth of issue capable of inheriting as heirs of Jemima, and her death being conceded, but two questions seem to be debated here.

It is said, in the first place, that a husband cannot be tenant by the courtesy of the separate real estate of the wife. The contrary of this proposition is settled law in Tennessee. In *Morgan v. Morgan*, 5 Mad. 480, it was held that, as at law, where the wife, during the coverture, is seized of an estate of inheritance, the husband having had issue by her capable of inheriting the estate, is entitled to the courtesy; so where the wife is seized of an equitable estate of inheritance, and has issue capable of inheriting it, the husband is equally entitled to the courtesy. It was further held in that case that she had an equitable estate of inheritance, notwithstanding the rents and profits were to be paid to her separate use for life, and that by the receipt of the rents she was seized of the estate, and having issue capable of inheriting, the husband was entitled to the courtesy. *Baker v. Heiskell* was decided mainly upon the authority of the case quoted. In that case the trustee was to receive all the rents and profits of the land, and to pay the same to her (the wife) and her heirs. The wife further had the power of appointing the uses and trusts of the land, and having died without exercising it, living the husband, it was held that he was entitled to his courtesy.—1 Cold. 641.

The only distinction, if it be one, between *Baker* and *Heiskell* and the case in hand is, that in that case the property was settled by a decree in Chancery; in this the settlement is made by the husband himself, who is claimed to be tenant by courtesy.

It is to be observed that it is only by virtue of the deed made by the husband in this case to Thrall that the wife became seized of an equitable estate of inheritance, and by virtue of her seizin of estate and the birth of issue the husband became tenant by the courtesy *inchoate*. The husband might, by his deed, have surrendered his tenancy by the courtesy as he might any other marital right, and the question is, has he done so by his deed? He certainly has divested himself of all the right to the property during the coverture, for the express object of the conveyance was to secure to his wife the possession, control and enjoyment of all his property. But we do not think that the deed looks to or provides for any settlement of the property beyond the life of his wife. The only effect of the provision, that the trustee has to hold for the benefit of her heirs and assigns, was to vest in her an estate of inheritance the very circumstance that gives rise to the tenancy by courtesy. It could not have the effect of settling the estate upon her "heirs or assigns." By a fair construction, then, we think that Daniel Hightower, by the deed, did surrender to his wife during the coverture the rents, profits and possession of this land. But, as we have already said, he has made no settlement of the estate beyond the lifetime of his wife. Now it is the death of the wife that renders the tenancy by courtesy consummate or complete. We think, therefore, that inasmuch as this deed makes no settlement of the land in the event of the wife's death, and provides only for her dominion and control over it during the coverture, that he has abridged his estate by his deed for that period only, and that having survived her he is entitled, as tenant, by the courtesy. We see no reason why, when he made this conveyance to his wife, he shall not be taken to have intended that she was to hold the estate, as every estate of inheritance is held by a wife subject to his courtesy. This tenancy is an incident to the estate created by the act of the law, and we think he would only deprive himself of it by his express renunciation.

The Chancellor of the Chancery Court of Shelby County having held to the contrary, his decree is reversed and modified upon this point, and the cause remanded to be proceeded in. We think, however, that the appellant should pay the costs of this Court.

Let a decree be entered in accordance with this opinion.

**CANTRELL v. THE STATE.**

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**March 3, 1877.**

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1. **TESTIMONY—OBJECTIONS TO—MUST BE MADE—WHEN.**—A party cannot, either in a civil or criminal suit, sit by without objecting to testimony, take his chances of acquittal or conviction, upon evidence deemed incompetent, and then ask a reversal for such testimony.

2. **WITNESSES—UNDER SUBPENA BY THE STATE—MUST BE SUMMONED—BY DEFENDANT—WHEN.**—The State is not bound to introduce any witness, however important, but if defendant wishes the testimony of a witness summoned by the State he must subpoena him or call him as a witness himself, and cannot complain if the State fails to furnish testimony for his defence.

3. **OBJECTIONS—TO JURORS—MUST BE MADE—WHEN.**—A defendant cannot remain quiet, and by his conduct accept a juror after an objection comes to his knowledge, especially when the fact is known before the jury is made up, or trial commenced, and then have a new trial when verdict is found against him.  
—[Ed.]

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FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

The defendant was indicted in the Circuit Court of Warren County for the murder of one Jones ; he was convicted of murder in the second degree, and sentenced to twenty years imprisonment in the penitentiary. Several questions are made here for reversal which we will notice shortly : 1st. It is insisted that certain confessions made by him in jail are improperly admitted, because of the fact, as stated in an affidavit for a new trial, that the prisoner had originally confessed his guilt to one Hawkins, and these confessions were the result of a promise to intercede for defendant, and get his punishment reduced so as to save his life.

It is now insisted that the State should have shown this influence removed before the testimony could have been admitted. Several answers might be given for this objection ; one is conclusive, that is, the trial proceeded, and the testimony was all permitted to go to the jury without any objection whatever made to it. We have repeatedly held that a party cannot, either in a civil or criminal case, sit by and not object to testimony, take his chance of acquittal or conviction on testimony deemed incompetent, and then ask a reversal for such testimony in this Court. There is nothing in the proof heard on the trial to raise the objection, or show that inducements were held out by Hawkins in obtaining the first confession ; it is only stated in an affidavit for a new trial.

The charge of his honor is correct, and the evidence abundantly sustains the verdict.

There are several affidavits presented on motion for new trial which, however, do not contain any matter that would demand of

this Court a reversal of the case. One matter is, that Hawkins had been examined on the former trial, was put under the rule by the State at the second trial, but not examined, and defendant says, would have given testimony favorable to him had he been put on the stand as a witness. We held in the case of Eason, at Jackson, some years since, that the State was not bound to introduce any witness, however important, but if defendant wished the testimony of a witness summoned by the State, he must subpoena him or call him as a witness himself, and could not complain if the State failed to furnish testimony for his defence. We have no doubt of the correctness of this rule, and adhere to it.

It is stated in the affidavit of one of defendant's attorneys that one Fultz, a jurymen, when asked on his *voir dire* whether he had formed an opinion, said that he had, and believed defendant guilty, but that the reply did not reach the ear of his counsel until after he had taken his seat. His attention was then called to it by another member of the bar and no objection made. This cannot aid defendant. He should have objected at once, presented the facts to the Court, when the jurymen could have been set aside. He cannot remain quiet under such circumstances, and by his conduct accept the juror after the objection comes to his knowledge, especially when the fact is known before the jury is made up or trial commenced, and probably immediately after the occurrence, and then have a new trial when the verdict is found to be against him.

The other matters in the affidavit are as to newly discovered testimony, in part, in matters, however, that could have no weight in changing the verdict if permitted to be heard; as to failure to have depositions of certain witnesses, there is shown an utter want of diligence in procuring their evidence, and even if had, it is of such character, as far as stated, as would not be very material in a future trial. There is nothing in the affidavits, in fact, on which a new trial ought to have been granted.

Affirm the judgment.

## THE MERCHANTS OF MEMPHIS v. THE CITY OF MEMPHIS AND F. C. SCHAPER, *Tax Collector*.

Jackson, December 12, 1876.

**JURISDICTION—OF STATE AND FEDERAL COURTS—IS EXCLUSIVE AND INDEPENDENT.**—Where a State or Federal Court has rightful jurisdiction of parties and the subject matter it must be allowed to proceed to judgment and execution; their jurisdiction being exclusive and independent, process issuing from the one cannot be enjoined by suit in the other.

**CASES CITED.**—*Freeman v. Hayne*, 24 Howard; *Buck v. Colbatt*, 3 Wall.; *U. S. ex rel. v. The Council of Keokuk*, 6 Wall.; *Riggs v. Johnson County*, 6 Wall.; *Supervisors v. Durant*, 9 Wall.; *The Mayor v. Lord*, 9 Wall.: *ex parte Hohnan*; 28 Iowa.

**MANDAMUS—FROM FEDERAL COURT—DEFENCE AGAINST BY PETITION, WITH NEW PARTIES—MUST BE MADE—WHERE.—NOT NECESSARY FOR PETITIONERS TO HAVE BEEN PARTIES TO THE ORIGINAL SUIT.—TAX-PAYERS ARE ENTITLED TO NO NOTICE, AN ORDINANCE LEVYING A TAX BEING LEGISLATIVE IN CHARACTER.—THE DECISION OF A COURT ORDERING A MANDAMUS HAS THE EFFECT OF A JUDGMENT—WHEN.**—When a mandamus from the Federal Court orders a tax to be levied to satisfy its judgment, petitioners avoiding the payment of such tax have no relief in the State Courts, since the jurisdiction to correct the judgment, or protect parties from its effect, must either be in the Court rendering the judgment or one having the revisory power upon writ of error. The questions being the same, the State Courts cannot take jurisdiction merely because the petitioners are new parties; it was not necessary that petitioners should have been parties to the original suit, since the Act of adopting an ordinance levying a tax is not judicial, but legislative, in character, no notice to taxpayers is requisite to give it validity. The decision of the Court ordering such a mandamus has the effect of a judgment, and leaves the defendant without discretion.

**CASES CITED.**—*Dunn v. Clark*, 1 Peters; *Christian v. Russell*, 14 Wall.

**MANDAMUS—ISSUES IN NATURE OF FIERI FACIAS—WHEN.**—If a mandamus issues to compel the levying and collection of a tax, to satisfy a judgment of that Court, it issues in the nature of an ordinary *perí facias*, and is not an original proceeding, but simply a mode of executing the judgment of the Court.

**CONSTITUTION—CONSTRUED.—MERCHANTS' TAX.**—The provision of the Constitution relied upon, in this case, is construed to mean simply that no merchants' tax—that is, the privilege tax upon merchants—shall be levied upon that part of their capital used in buying goods to sell to non-residents, but the property tax upon merchants shall be uniform with general property tax.

**ARGUENDO—STATE COURT CAN TAKE JURISDICTION—WHEN.**—Cases might arise where the State Court could take jurisdiction—that is, if the city was proceeding to collect a tax from property exempt, or to collect double the amount assessed—the tax-payer, without denying the legality of the levy, might have his remedy in a State Court to avoid paying that which under the levy he was not bound to pay.—[Ed.]

McFARLAND, J., DELIVERED THE OPINION OF THE COURT.

This petition to Judge Heiskell was filed in the Circuit Court at Memphis by a number of persons—merchants of the city. It prays for a *certiorari* and *supersedeas* to bring up and have superseded distress warrants against each of them in the hands of the city Tax Collector for the collection of a special tax assessed against them severally, which they aver to be illegal. It may be stated somewhat more in detail than is shown in the

petition. That T. E. Brown & Co. recovered a judgment against the city of Memphis for about \$29,200 in the Circuit Court of the United States for West Tennessee. This recovery was upon a contract for paving streets of the city—the Act of the Legislature authorizing the city to make the contract provided for, charging the cost of the paving upon the adjoining lot owners in proportion to the frontage of the lots on the streets. This was resisted by a portion of the lot owners, and the law in this respect declared by this Court to be unconstitutional—the city having, however, guaranteed the payment to the contractors, the aforesaid judgment was obtained. In 1873 the Legislature passed an Act which, it is claimed, gave the city authorities the power to levy a tax to pay Brown & Co., and others, the amounts due them. Afterwards, in 1875, the Act of 1873 was repealed. In March, 1875, a writ of mandamus, issued from the said Circuit Court against the city, which was afterwards made peremptory, commanding the City Council to levy a tax to pay a part of Brown & Co.'s judgment. In obedience to this mandate an ordinance was adopted on the 10th of December, 1875, levying a special tax of 54 cents on the \$100 worth of property to pay \$125,000 of Brown's judgment, the mandamus directing that this amount only should be levied for the year 1875, like amount for 1876, and the remainder for the next year following; this proportionment of the levy was agreed to by Brown & Co. It was ascertained that the city Tax Collector was omitting to collect this special tax from the merchants on their capital, and upon application a peremptory writ was again obtained from the Court commanding the city authorities to extend this levy of 54 cents on the \$100 worth to the capital of the merchants, and in obedience to this process the city authorities, on the 23rd of March, 1876, passed another ordinance reciting the former ordinance, and also the fact that the city Tax Collector had been advised that it did not extend to merchants, the former ordinance was therefore declared to apply to merchants' capital, and said special tax of 54 cents on the \$100 of merchants' capital for the year 1875, as previously assessed and returned, was thereby levied for the purpose of paying said judgment to J. E. Brown & Co., and the Tax Collector was directed to proceed to collect and pay the same over.

This tax, the petitioners charge, is illegal and levied without authority of law, and upon this ground they pray to have the distress warrants issued for the collection of said tax superseded. The petition sets forth a review of the various statutes constitut-



ing the charter of the city and its amendments, embracing all the Acts previous to the Act of 1873, above referred to, and it is maintained that under these Acts the city authorities could not levy for all purposes a greater tax than \$1.60 upon the \$100 worth of property in one year; that this sum had been levied and paid for the year 1875, and the power under these Acts, therefore, exhausted before the levy of the special tax in question; that the Act of 1873 had been repealed before the special tax was levied, so that the levy of the special tax in question was entirely without authority of law.

The petition further avers, in substance, that the *assessment* for the year 1875 of the capital of the various petitioners was made under the assessment Act of 1873, which fixes the rule, as to merchants, requiring them to report at the end of the year the highest amount in value of goods, wares and merchandise which such merchant had had on hand at any one time during the year, and he is taxed on this amount as his capital. The city changed the time of this report to the 1st of July.

It is further averred that in addition to this tax upon their goods, they were afterwards required to add the amount of money on deposit and choses in action due them.

It is averred that this resulted in compelling them to pay double taxes on such parts of their goods as they had purchased on a credit, and the sums thus ascertained in reality far exceeded their capital, and that the law violates the Constitution requiring equality of taxation. That the Act also violates the last clause of the 28th Sec. of Art. 2nd of the Constitution, which forbids the levying of any greater tax upon that part of a merchant's capital used by him in the purchase of goods sold to *non-residents* than the *ad valorem* tax on property, it being averred that three-fourths of the capital of the respective petitioners was thus used. Upon these grounds the petitioners ask that the distress warrants be perpetually superseded. The writs were temporarily granted, but upon motion and argument the petition was, by the Court, dismissed, and the petitioners have appealed.

We have had the benefit of very elaborate and able arguments, and have endeavored to give the questions presented a careful consideration.

It will be observed that the petition puts the case upon two grounds, somewhat different in their character:

1st. That the ordinance levying this special tax is, itself, illegal—the city government having no power under their charter and laws to levy the tax.

2nd. That if this be not so, the amounts claimed against petitioners severally is too large, because the *assessment* of their capital for the year, which was made under the assessment Act of 1873, (modified by the city ordinance) violates the Constitution and assesses their capital above the proper amount.

The argument has been principally upon the first ground, and here the petitioners are met with objection. That as the ordinance of the City Council levying the special tax complained of was passed in obedience to a peremptory mandamus issued by the Circuit Court of the United States for the satisfaction of a judgment rendered by the Court. The State Court cannot interfere to supersede or stay the action of officers acting in obedience to this mandate; that to do so would necessarily result in conflict between the officers charged with execution of the process of the two Courts. It is admitted by the counsel for the petitioners that this question is one deserving very serious consideration; they earnestly maintain, however, that it is not fatal to their case. There are certain general principles applicable to the question which are well established and, indeed, conceded; that is to say, that where a State or Federal Court has jurisdiction and control of the *res* or subject matter of litigation, no process from the other Court can be allowed to take such property out of the possession of the officers of the Court first acquiring jurisdiction or interfere with its action in regard thereto, and this without regard to whether the seizure was rightful or not, as in *Freeman v. Hayne*, 24 Howard, where it was held that property seized by a Marshall under process from the Federal Court as the property of one person could not be replevied by a suit in the State Court by another claiming to be the true owner. In *Buck v. Colbatt*, 3 Wall., it was held, however, that although the property could not be thus taken from the jurisdiction of the Federal Court, or its action in regard thereto interfered with, yet if the process from the Federal Court commanded the Marshall to seize the property of A. generally, without specifying any particular property, and the Marshall wrongfully seized the property of B., that the latter might maintain trespass in the State Court against the Marshall for the wrongful seizure.

Again, process from one Court, either Federal or State, cannot be enjoined or otherwise controlled by suit in the other jurisdiction where the jurisdiction of the parties and subject matter is once rightfully obtained; the Court so obtaining jurisdiction must be allowed to proceed without interference to judgment and execution, its jurisdiction is necessarily exclusive and independent

of the other; and this, notwithstanding injunctions operate upon the parties and not upon the Courts. This rule is uniform, and has been recognized in many cases. We refer, as more especially applicable, to the cases of United States *ex rel.* v. The Council of Keokuk, 6 Wall., where a mandamus was issued from a Federal Court commanding the City Council to levy and collect a tax to pay the relator's judgment, it was held to be no sufficient answer that the City Council had been previously enjoined, at the suit of the tax-payers in the State Court, from levying or collecting the tax; also *Riggs v. Johnson County*, 6 Wall.; also *Supervisors v. Durant*, 9 Wall.; *The Mayor v. Lord*, 9 Wall.

Again it is settled that a mandamus, when so issued to compel the levying and collecting a tax for the purpose of paying a judgment, is issued in place of an ordinary *perí facias*, and is simply a mode of executing the judgment of the Court and is not an original proceeding. From these general rules it is argued for the defendants in this case, that as it is conceded that the U. S. Circuit Court had rightful jurisdiction of the case of *T. E. Brown & Co., v. The City of Memphis*, that it had rightful jurisdiction to issue the *mandamus* to compel the city to levy and collect the tax to pay the judgment, and that as a consequence no State Court can rightfully interfere to declare void the ordinance passed by the City Council in obedience to this mandate, or to prevent the city tax-collector from doing what the Federal Court has commanded shall be done, that is, collect the tax.

But it is argued for the petitioners that, in a case like this, the Federal Court can only award the mandamus to compel the levying and collecting of a tax when it is a simple, plain, ministerial duty upon the part of the City Council to do so; but where the power of the City Council to levy such tax involves legislative or judicial discretion, to be determined under the general laws of the city, that the Court cannot award mandamus, and so the judgment of the Federal Court in this case is void and no defence to the city authorities who have obeyed it. The premises may be admitted, but the conclusion certainly does not follow. It being conceded that the Federal Court had jurisdiction in the case of *T. E. Brown & Co., v. The City of Memphis*, and that there being no other remedy the Court might award a mandamus to compel the city to levy and collect the tax, provided it appeared to the Court to be a plain ministerial duty. It follows that we cannot undertake to say that its action was void, because in our opinion it was not a mere ministerial duty upon the part

of the city to levy the tax. This was a question for the Federal Court to decide, having jurisdiction of the subject-matter and parties, it must determine the facts and law upon which its action is based, and the extent of its jurisdiction and powers. We must take it, that it was determined by the Court that it was the plain ministerial duty of the city to levy and collect the tax, and we have no jurisdiction to review this judgment.—See the reasoning of Judge Dillon in the case of *Ex parte Hohnan*, 28 Iowa.

But again it is argued that whatever be the effect of the mandamus proceeding as between Brown & Co. and the city authorities, that the merchants and tax-payers are not bound by this proceeding as they were not parties thereto, and that the judgment and the ordinance levying the tax as to them is void. That when the city undertakes to enforce this tax against the tax-payers that new rights and questions arise between them, which the tax-payers have the right to litigate. That they must have their day in Court. That the Federal Court might order the city authorities to levy and collect the tax, but whether under the law the city authorities had the power to levy such tax, was a question between the city authorities and the tax-payers to be litigated between them *de novo*.

The Federal Court in awarding the peremptory mandamus did not merely mean to say to the city, levy this tax provided you have under your charter the power to do so, but it necessarily decided not only that the city had the power, but it was its plain duty to do so, otherwise no mandamus could have been awarded. This decision certainly had the effect of a judgment and left the city no discretion. It was not necessary, or proper, that the tax-payers should have been parties. The act of adopting the ordinance levying the tax was not judicial but legislative in its character, and no notice to the tax-payers was necessary to give it validity as in judicial proceedings; it was as a legislative act of taxation, so far as notice is concerned. It is true that when a tax is so levied without power or authority of law, the tax-payer may appeal to the courts to have it so declared, and its enforcement prevented—of course, if this mandamus were out of the way, the jurisdiction of this Court to enquire into the equality of this tax would be unquestionable, but for this Court now to declare the tax illegal is necessarily an attempt to reverse the judgment of the Federal Court, and to supercede the distress warrants is necessarily to interfere with the process which the Court has adopted to enforce its judgment.

It is said that the tax-payers are entitled to be heard—that

*James C. Bradford.*

they must have their day in court—that they cannot have a hearing in the Federal Court, because a proceeding in that Court by them would be an original proceeding, and that Court could not take jurisdiction of their case, because the citizenship of the parties was not such as to give the Court jurisdiction, and their only right to be heard is in the State Court. That the proper course was for the Federal Court to suspend the execution of its judgment until the tax-payers could institute the proper proceeding in the State Court, and that the Federal Court would then conform its judgment in accordance with the judgment of the State Court. The cases of *Dunn v. Clark*, *1 Peters*, and *Christian v. Russell*, *14 Wall.*, are relied upon to support this argument. These authorities hold, as do many others, that a bill in the equity side of the Federal Court which is merely defensive to a judgment of that Court may be entertained without regard to citizenship. If it is an original bill, in which new features and other matters are involved, the Court cannot take jurisdiction unless the citizenship of the parties authorize it, but may suspend the execution of its judgment to give the parties the opportunity to litigate their new rights in the State Court. The case of *Christian v. Russell* may be taken as an illustration—judgment had been rendered in the U. S. Court against a debtor in favor of certain parties upon one note, and another suit was pending upon a similar note. Whereupon other parties came in by bill on the equity side and alleged that they had the right to recover of the debtor the money due on these notes by virtue of a previous equitable assignment. The Court held that this was a new and original suit, and as the citizenship did not authorize it the Court could not take jurisdiction, but left the parties to seek their rights in the State Courts; but as it was clear that both claimants were not entitled to recover the money from the debtor, it was proper to suspend the execution of the judgment of the Federal Court until the rights of the new parties arising upon the new state of facts should be adjudged in the State Courts.

It is claimed that this is a parallel case—that the tax payers are new parties, and new questions arise between them and the city, and that the Federal Court should suspend its judgment until these new questions are decided in the State Courts—the Federal Court not having jurisdiction on account of citizenship.

The tax-payers are in a certain sense new parties, but the question they make is precisely the question which arose between *Brown & Co.* and the City, and which was decided. True, they were not parties, but it was the duty and interest of the city to

make for them all the defense that could be made as to the want of power; and when the tax-payers presented themselves in the Federal Court—as it appears from a report of the proceedings they did—they presented themselves standing in precisely the attitude of the city, not presenting a new right, but simply denying the correctness of the judgment awarding the peremptory mandamus. They might present new facts and considerations to the Court, but the question was the same. The judgment they asked the Court to render in their favor was to set aside, reverse, or suspend the judgment rendered. This we think was a defensive and not an original proceeding, and that the jurisdiction to correct the judgment complained of, or to protect the petitioners from the effect thereof, must be either in the Court that rendered the judgment, or in the Court possessing revisory power upon writ of error. We understand from the report of the proceedings that relief was asked by the tax-payers in the form of a bill on the equity side of the Court, or upon petition, and the Court denied the relief, but not for want of jurisdiction; and the entire proceedings are to be reviewed in the Supreme Court upon writ of error prosecuted by the city, whether by the tax-payers also or not, we are not certainly informed. But the question as to the correctness of the judgment awarding the mandamus will certainly arise upon the writ of error of the city, whether the tax-payers be technical parties or not; but we doubt not that they also will have a fair hearing.

At any rate we think that we cannot take cognizance of the case merely upon the ground that the application is made by the tax-payers and that they are new parties. It seems to us manifest that we cannot render the judgment prayed for without necessarily producing a conflict between the officers commanded to execute the process of the Federal Court and our officers. The Federal Court has commanded this tax to be levied and collected and paid over. How can we separate its process? It has been in fact virtually conceded in argument that we cannot rightfully render, or attempt to enforce such judgment, but it is said that if this Court will express an opinion as to the power of the city to levy this tax, that the Federal Court will adopt our judgment, because they universally adopt the construction given by a State Court to its statutes. It is a rule that the Federal will adopt the construction given by a State Court to the statutes, to be found in previous adjudications of the State Court, but it is unquestionably the province of the Federal Court to determine the construction of any statute of a State, where the question arises in any

case of which they have jurisdiction, and if no previous adjudication has been made on the question by the State Court the Federal Court decides for itself, and it would be hardly proper for this Court to express an opinion merely as advisory to the United States Supreme Court, in a case now pending in that Court, in a case where we cannot take jurisdiction to pronounce any judgment.

Although the construction of the statutes of this State is peculiarly the province of our Courts, yet this must be in cases where we have rightful jurisdiction, and it would not be respectful to assume that the Supreme Court cannot properly or correctly decide questions of this character without our instructions, and that Court would certainly not be bound to follow our opinion, should we thus express it in a case not properly before us.

It has been said that the Judge of the Federal Court expressed a desire that the opinion of this Court should be had upon the question. We see nothing of this sort in his opinion, or the proceedings had before him, if, indeed, this could have any effect.

We hold, therefore, that we cannot take jurisdiction to supersede the distress warrants complained of, upon the ground that the city authorities exceeded their power in levying the tax because the tax was levied in obedience to a mandate of the Federal Court, commanding the tax to be levied, issued in a case where the Court had jurisdiction of the parties and subject-matter, and having no rightful jurisdiction we decline to express any opinion as to the legality of the tax.

It is possible, however, that cases might arise where the State Courts could take jurisdiction. That is, if the city were proceeding to collect a tax from property exempt, or to collect double the amount assessed, the tax-payer, without denying the legality of the levy or attempting to avoid its effect, might have his remedy in a State Court, to avoid paying that which under the levy he was not bound to pay.

The ground taken in the petition amounts in substance to this, that the assessments of their capital for the year 1875 were too high—that they are each being required to pay upon a larger capital than they should be. This we think in any view is not a ground to supersede the distress warrants in this case. Petitioners do not appear to have complained of these assessments, on the contrary that they paid the general levy upon this assessment without complaint. If the assessments were wrong the statutes we think provide a mode for correction or redress. Besides, we think there is nothing in the question made. The provision of

the Constitution relied upon means simply that no merchants' tax—that is, the privilege tax upon merchants—shall be levied upon that part of their capital used in buying goods to sell to non-residents, but the property tax upon merchants shall be uniform with the general property tax.

If the act as is contended really requires merchants to pay tax upon goods not paid for, and also money and choses in action, this is no more than is required of others. In many instances persons are required to pay taxes on land on which they have not paid the purchase money, and the persons to whom they owe the purchase money are also required to pay taxes upon the debts thus due them, in reality paying twice on the same property, and other similar instances of practical inequality might be cited.

The judgment of the Circuit Court dismissing the petition is affirmed.



W. G. POINDEXTER *v.* W. J. CANNON.

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 Jackson, May 26, 1877.  
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BOND—JUSTICE OF THE PEACE CANNOT EXTEND TIME—TO GIVE.—A Justice of the Peace cannot extend time for the purpose of giving bond beyond the time prescribed by law. *See* 3 *Head*, 209.

CASES CITED.—McCarver v. Jenkins, 2 Heisk. 629; Gilbert v. Driver, 3 Head. 463; Code, Sections 3140, 3141, 3394, 3399, 3398.—[Ed. *See*, 365.]

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 DEADERICK, C. J., DELIVERED THE OPINION OF THE COURT.

The Circuit Judge upon motion dismissed the appeal of plaintiff and affirmed the Justice's judgment, and plaintiff appealed.

The judgment of the Justice was in replevin, and in favor of defendant in proper form. It was rendered on the 5th day of December, 1876, from which the plaintiff demanded an appeal on the 7th of December, 1876, and it is recited that the appeal "is granted when he gives bond and security according to law, and I allow him twenty-five days from this date to make bond," dated the 7th of December, 1876. Bond was given on the 28th of December, 1876.

Plaintiff insists that the Justice of the Peace had the power to take the bond and grant the appeal, as shown in the record, and relies upon the case of McCarver v. Jenkins, 2 Heisk. 629, and Gilbert v. Driver, 3 Head. 463, as warranting the action of the Justice.

We do not think a proper construction of the points decided in either of the cases cited sustains the action of the Justice of the Peace. The 3rd Head. case expressly decides that an appeal cannot be granted after the expiration of two days from the date of the judgment, and reserves the question as to whether a Justice may take a bond after two days when the appeal has been prayed and granted within the two days, as required by § 3140 of the Code. The next section, 3141, provides that bond and security shall be given when the appeal is granted. But in 2nd Heisk. 629, it was held that this section was directory, and that after the grant of the appeal a bond may be given after the expiration of two days. In that case the appeal was prayed and granted on Monday, and the Justice gave the party the form of a bond, which he took away with him, and returned to the Justice the next Saturday executed and dated the day of the rendition of the judgment, and this was held sufficient to entitle him to an appeal. This was the extent of the holding in that case.

In both the cases cited it appears that the appeal was prayed and granted within the two days required by law. But in this case, while the record shows a demand for an appeal, it also shows that it was to be granted at some future time within 25 days *when* a bond should be executed.

In the case in 2nd Heisk. Judge Sneed, in delivering the opinion of the Court, says, that a substantial compliance is all that is necessary; that the absence of a security might demand an indulgence of a few days, and cites the rule long prevalent in Chancery cases of granting time to give security after appeal prayed and granted.

We have held before the passage of a recent Act that the Circuit Court could not grant time for giving bond beyond its term, and the practice, when applied to proceedings before Justices' Courts, would be liable to great abuses, and we are not disposed to extend it beyond the rule prescribed in the 2nd Heisk. case. In §§ 3394 to 3399 of the Code the mode of proceeding in replevin before a Justice of the Peace is prescribed. § 3398 expressly provides that either party may appeal from the Justice's judgment within two days after judgment *on giving bond in double the value of the property*, etc. Here is a special bond required for appeal in replevin cases and a time within which the bond is to be given..

If the Justice may give 25 days' time for a bond to be executed, which the statute, in its language, says must be executed within 2 days, why may he not extend 50 days' time or more? The cases relied on do not warrant the proceedings of the Justice in this case, and there was no error in dismissing the appeal.

Affirm the judgment.

## S. H. P. MISKELLY v. W. J. PITTS.

Jackson, June 2, 1877.

1. **DEED—CONSTRUED TO MERELY RETAIN A LIEN—WHEN.**—A deed of conveyance containing the following clause: "Nevertheless, this deed of conveyance is null and void and of no effect until all the purchase money is paid, then of full force and effect," is construed to retain merely a lien or mortgage to secure the unpaid purchase money; a non-compliance with the conditions does not avoid it absolutely.

**CASES CITED.**—Barnett v. Clark, 5 Sneed 435; Caruthers v. McBurney, 3 Sneed 593; Law v. Mannering, 8 Yerg. 435.

2. **EQUITY—TO HAVE RELIEF IN UPON AN ALLEGATION OF WANT OF TITLE OR BREACH OF COVENANTS OF SEIZIN—WHAT REQUISITE.**—A party can have no relief in equity for the alleged breach of the covenant of seizin, or upon an allegation of want of title, no fraud or insolvency being charged, unless a clause in the deed changes its character, from an executed to an executory contract. —[ED.]

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M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

The original bill is to enforce a vendors lien for a balance of purchase money due upon a tract of land sold by the complainant to the defendant. At the date of the sale the complainant executed and delivered to the defendant a deed for the tract of land, reciting in the first part the payment in full of the purchase money, containing covenants of seizen and warranty and against encumbrances. Following this, however, is the following clause: "Nevertheless, this deed of conveyance is null and void and of no effect until all the purchase money is paid, then of full force and effect."

The bill shows that a balance of the purchase money remains unpaid, and claims a vendors lien which he asks to have enforced. The defendant filed an answer admitting the allegations of the bill, setting up, however, an additional payment, and by way of cross-bill charges that the condition set forth in the deed not having been complied with, no title had ever vested in the defendant. The cross-bill then charges that "complainant has no title to said land, and never had any," and sets forth the fact that defendant had made valuable improvements on the land. The cross-bill prays that the original complainant be compelled to deraign a perfect title to the land, and upon his failure to do so, that the contract be rescinded with an account of the purchase money paid and improvements. The Chancellor sustained a demurrer to the cross-bill, and gave relief upon the original bill. The defendant has appealed.

It appearing from the admissions of the cross-bill that the complainant therein is in possession of the land, under a deed

with covenants of general warranty and seizin, he can have no relief in equity for the alleged breach of the covenants of seizin or upon an allegation of want of title, no fraud or insolvency being charged, unless the peculiar clause in the deed we have referred to changes the character from an executed to an executory contract.—See *Barnett v. Clark*, 5 Sneed, 435.

It is argued, however, that the clause in question prevents the deed taking effect, or vesting the title, and converts it into an executory contract, and therefore the vendee may refuse to perfect the purchase until the vendor deraigns a perfect title. A condition in a title bond similar to the condition in this deed has been held a condition for the benefit of the vendor, which he might waive, and which the vendee could not take advantage of.—*Caruthers v. McBurney*, 3 Sneed, 590; *Law v. Mannerring*, 8 Yerg., 435.

There is a still stronger reason for applying the same reason to a case of a deed, and in a case like this, where a large part of the purchase money has been paid, it is not probable that a Court even at the instance of the vendor would enforce this condition to the extent of declaring the entire contract void, but would rather construe this clause as retaining a lien or mortgage to secure the unpaid purchase money. At all events, this is the extent of the relief claimed by complainant, and to this relief we think he is undoubtedly entitled.

Decree affirmed, with costs.

TERRELL THOMPSON, *Surviving Partner, etc.*, v. W. W. WICKERSHAM AND J. N. WARDLAW.

Jackson, June 2, 1877.

**HOMESTEAD—RIGHT OF—CANNOT PREVAIL OVER VENDOR'S AND MECHANIC'S LIEN—WHEN.—SUCH LIEN CONTINUES—HOW LONG—AND MAY BE ENFORCED—HOW.**—The homestead right cannot prevail over the lien given by statute, in favor of one furnishing the material for the building on the lot claimed as a homestead, and this lien includes not only the buildings erected but also the lot upon which they are erected, and continues for one year after the time at which the materials were furnished. The lien thus given by statute may be enforced by attachment, either at law or equity.

CASES CITED.—Code, Sections 1981a, Act of 1870, 2114a, 1985, 1987.—[Ed.]

DEADERICK, C. J., DELIVERED THE OPINION OF THE COURT.

In August, 1873, complainant filed his attachment bill against defendants to enforce a lien given by §1981a of the Code, for material furnished in October, 1872, to defendant Wickersham for building a house, erected by him, upon a lot described in the bill. The lot was bought of defendant Wardlaw, and the bill seeks, subject to the vendors lien, to have the lot and building thereon sold to pay for the material furnished.

The Chancellor so decreed, and the defendant Wickersham appealed.

He resists the recovery on two grounds; first, upon his homestead right, and, secondly, upon the ground that the 25,000 brick he got, being the material alleged by complainant for which he seeks a recovery, in fact belonged to him and one Boydston, as partners.

The acts exempting the homestead from sale by execution or attachment for debts, do not exempt it from sale for the satisfaction of any debt or liability contracted for its purchase, or legally incurred for improvements made thereon.—Act of 1870, Code, § 2114a.

And section 1981a of the Code gives a lien in favor of all persons furnishing any portion of the material for the building contemplated by § 1981.

The homestead right, therefore, cannot prevail over the lien given by statute, in favor of one furnishing material for the building on the lot claimed as a homestead. And this lien includes not only the buildings erected, but includes also the lot upon which the buildings are erected—Code, 1985—and continues for one year after the time at which the materials were furnished. The lien thus given by statute may be enforced by attachment, either at law or equity.—§ 1987.

The evidence in the case satisfies us that defendant Wickersham had no claim as a partner upon the brick he received of complainant. If he had any claim, it was against Boydston, upon the footing of a separate contract between him and Boydston, that he, Wickersham, was to have one half of the profits of Boydston's contract. But even this claim is not satisfactorily made out. Boydston denies it, and admits that he received from Thompson all the brick he was entitled to under his contract with them, and Thompson proves that he sold the brick to Wickersham, which went into his building, and notified him that he held him responsible for them.

We therefore think that the Chancellor's decree was correct, and affirm it.

## STEEL v. CHESTER.

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Jackson, May 26, 1877.

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**ATTORNEYS' FEES—LIEN FOR—ENFORCED—HOW.**—The duty of the Courts is to declare a lien for attorneys' fees, where the amount of the fee is not fixed by contract, and parties are under no disability, and leave the attorney to enforce this lien by appropriate proceedings in a Court having jurisdiction of the question.

**CASES CITED.**—*Mary J. Perkins v. P. G. Stiver Perkins*, Nashville, 1871.—(Ed.).

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FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

The only question in this case is whether a Court in which a suit has been determined upon petition of the attorneys, can declare a lien on land, and proceed in that case to enforce said lien by ordering a sale of the land in satisfaction of the fee, after ascertaining the amount by reference to the Clerk and Master and report by him.

This Court held in the case of *Mary J. Perkins by next friend, etc., v. P. G. Stiver Perkins et al.*, Nashville, 1871, after full consideration that this could not be done, and enjoined a sale so ordered. The Court held in that case that the duty of the Courts was to declare the lien, where the amount of the fee was not fixed by contract and parties under no disability, and leave the attorney to enforce this lien by appropriate proceedings in a Court having jurisdiction of the question. We think this the sound rule, and feel bound to adhere to it.

Questions may arise between the attorney and client on which there ought to be issues made, and where the client should have the means and make his defences fully. His attorney, in such a proceeding as this, ceases to represent him, his interest becoming antagonistic on this question.

Reverse the decree and dismiss the petition.

# General Legal Information.

CONDUCTED BY

## JAMES C. BRADFORD.

OF THE NASHVILLE BAR.

List of Journals from which Abstracts are taken :

NAME.	ABBREVIATION.	ADDRESS.	PUBLISHED.	PRICE.
Albany Law Journal	Alb. L. J.	Albany, N. Y.	Weekly.	15 cents.
American Law Record.	Am. L. Rec.	Philadelphia Pa.	Monthly.	50 cents.
Central Law Journal.	C. L. J.	St. Louis, Mo.	Weekly.	50 cents.
Chicago Legal News.	C. L. N.	Chicago, Ill.	Weekly.	10 cents.
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### BOOK NOTICES.

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#### ABSTRACTS.

##### ATTORNEY. Cause for Suspension.

An attorney of a Court who, when moving for the admission of a person as a member of the bar, conceals the fact, within his own knowledge, that the board of examiners has reported adversely upon such application, is guilty of such want of fidelity to the Court as will justify his suspension. *In re* Clarence Deringer, C. P. of Penn.—[Ch. L. N., Sept. 15, 1877.

**DEED. Evidence. Parol Proof to Contradict Terms of.** A deed absolute on its face may be shown by parol to be a security for a loan of money. *Hubbard v. Stetson et als.*, Sup. C't D. C.—[Wash. L. R., Sept. 10, 1877.

**Description of Land. Sufficiency of.** Grant of "all the lands I own in the town of Canaan" insufficient, and conveys no title. *Herman v. Deming*, Sup. C't Conn.—[L. & E. R., Aug. 22, 1877.

**EVIDENCE. Incompetency of Wife of One Defendant as Witness for his Co-defendant.** Where the defence of two parties is the same and indivisible, the wife of one defendant cannot testify in behalf of the other defendant, unless there are special circumstances which would render her a competent witness for her husband also. *Stewart v. Stewart*, Sup. C't Wis.—[L. & E. R., Aug. 22, 1877.

**FEDERAL COURT. Removal of Causes From State Court.** Under the Act of March 3rd, 1875, the right to remove a cause from a State Court to the United States Circuit Court exists

in all cases, where there are substantial parties, citizens of different States, on opposite sides of the cause, although there are parties on the opposite sides who are citizens of the same States. *Girardey v. Moore et al.*, U. S. Cir. C't, S. D. Ga.—[C. L. J., July 27, 1877.

**LANDLORD AND TENANT. Liability of Landlord for Acts of Tenant.** A tenant is not the agent of his landlord in such a sense as to make the latter responsible for the malfeasance or misfeasance of the former in respect to his use of the premises. *White & Co. v. Montgomery*, Sup. C't Ga.—[L. & E. R., Aug. 29, 1877.

**LIBEL.** A newspaper criticism, however severe, upon any thing publicly exhibited, or any thing of public interest, such as the celebrated "Cardiff Giant," is privileged, and will not support an action unless it appear that it was maliciously done. *Gott v. Pulsifer*, Sup. C't Mass.—[L. & E. R., Aug. 29, 1877.

**NEGLECT. Liability of Railroad for.** A railroad company is not liable for an injury to a person resulting from its failure to exercise ordinary skill and care in the erection or maintenance of its station house, where, at the time of receiving the injury, such person was at such station house by mere permission and sufferance, and not for the purpose of transacting any business with the company or its agents, or any business connected with the operation of the road. *P. F. W. & C. R. R. Co. v. Bingham*, Sup. C't Ohio, Cent. L. J., July 27, 1877.

**PARTNERSHIP. Order of Liability of Partnership Assets.** Partnership property is primarily liable for partnership debts, and the purchaser of a partner's interest in partnership property takes subject to partnership equities. *Ross v. Henderson*, Sup. C't N. C.—[L. & E. R., Aug. 22, 1877.

**PROMISSORY NOTES. What Destroys Negotiability of.** The insertion in a promissory note of words allowing fee for collection if not paid when due, destroys its negotiability, and an indorser thereon is not liable as such. *Woods v. North*, Sup. Ct. Pa.—[Alb. L. J., Aug. 18, 1877.]

**SLANDER. Privileged Communications. Words Spoken From the Pulpit.** Words spoken by a clergyman from the pulpit concerning a parishioner, though in good faith, and for a commendable purpose, are not privileged. *Magrath v. Finn*, Irish Ct of Common Pleas.—[Alb. L. J., Sept. 15, 1877.]

**1. SLEEPING CAR. Not Liable as Inn-Keepers.** The owners of sleeping cars, who receive pay in advance from lodgers merely for the sleeping accommodation afforded by their cars, and this only from a particular class of persons, and for a particular berth, and for a particular trip, are not liable as inn-keepers for money that may be stolen from the persons of such lodgers on their cars.

**2. Not Liable as Carriers.** The proprietors of sleeping cars, who only furnish sleeping accommodations for travelers who have paid for their transportation to the railroad company over whose road the sleeping car runs, no part of which is received by the owners of the sleeping cars, are not carriers, and cannot be held liable as such, for property lost by or stolen from lodgers whilst on their cars. *Pullman Palace Car Co. v. Smith*, Sup. Ct. Ill., Cent. L. J., July 20, 1877.

**STATUTE OF LIMITATIONS. As to Attorneys and Collection Agents.** The statute of limitation does not run in favor of an attorney, who has received money of his client by virtue of his

official position; but it will run in favor of a mere collection agent, who has collected money under a contract. *Wickersham v. Lee*, Sup. Ct. Pa., L. & E. R., July 18, 1877.

**Partial Payment by Co-Maker of note.** A partial payment made by co-maker of a note before the bar of the statute has attached, takes the case out of the statute as to both makers. *Bennett v. McCause*, Sup. Ct. Mo., L. & E. R., July 4, 1877.

**TELEGRAPH. Status of Company in Transmitting Messages.—Liability of Company.** Where a message is delivered to a telegraph company for transmission, it occupies the legal status of a bailee for hire, and not that of a common carrier; and, if such message be not sent as directed, such company is liable for damages resulting therefrom, unless it shows that the diligence necessary and appropriate to that peculiar business has been exercised. *W. U. Tel. Co. v. Fontaine*, Sup. Ct. Ga., L. & E. R., August 1, 1877.

**Effect of Agreement Exempting Company from Liability.** An agreement "that the company shall not be liable for errors or delays in the transmission or delivery, or for non-delivery of such messages, from whatever cause occurring," will not relieve it from liability for damages resulting from a failure to deliver a message by reason of its own gross negligence. Such a contract the law does not recognize. *Ibid.*

**TORT. Damages. Measure of.** The measure of value for coal mined, in a suit for specific performance, is the difference between the market value and the cost of mining it and getting it to market. *Brown v. Dibbs*, Privy Council, on appeal from Sup. Ct of New S. Wales.—[L. & E. R., Aug. 22, 1877.]

**WILL. Residuary Legatees.** Where a testator disposes of his estate, making certain specific devises and bequests, and appoints residuary legatees, they, and not the heir at law, take the realty not mentioned in the will. *Hughes v. Pritchard*, English C't of Appeal, Ch. Div.—[L. & E. R., Aug. 22, 1877.

**Legacies. General and Specific.** Where there are both general and specific legacies and devises, those which are general must first be used for the payment of debts, even if they are

thus entirely consumed, before resort can be had to those which are specific. *Farnum v. Bascom*, Sup. C't Mass.—[Wash. L. R., Sept. 10, 1877.

**Preference Among Legatees.** When legacies or devises must fail to some extent, the Court will consider the situation of the several beneficiaries, and will accord a preference to those who are not pure beneficiaries, but who, in consideration of the legacy, are to relinquish or have relinquished some important right. *Ibid.*

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VOL. I. NASHVILLE, TENN., NOVEMBER, 1877. No. 7.

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STATE, *for the use, etc.*, v. JAS. A. MURRAY, *Adm'r.*

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Jackson, May 19, 1877.

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**ADMINISTRATOR—STATUTE OF TWO YEARS AND SIX MONTHS DOES NOT RUN AGAINST CREDITOR—WHEN.**—If an administrator negotiates for delay, until the happening of a certain possible event, and obtains it, with or without special verbal request, and the effect of it has been to paralyze the vigilance of the creditor, he will not be entitled to the benefit of the statute by reason of such delay.

**FACTS.**—The administrator sought an interview with the creditor upon the subject of a settlement, remarking to him that he wanted to settle the whole matter, but did not wish to do so until he could settle with another creditor at the same time. The Court say, this was sufficient application for delay, to protect the creditor and save the bar.

**CASES CITED.**—Code, §§ 2280, 2785; F. and M. Bank v. Leath, 11 Hum. 515; Birdsong v. Birdsong, 2 Head. 603; Trott v. West, 9 Yerg. 433; 1 Sneed 470; Puckett v. James, 565, 567.—[Ed.]

SNEED, J., DELIVERED THE OPINION OF THE COURT.

The action was brought by N. W. Galloway, one of the distributees of the estate of Emma C. Galloway, deceased, against the defendant as administrator of the estate of Jas. H. Murray, deceased, to recover the plaintiff's distributive share of said Emma's estate, ascertained by settlement of accounts of defendant's intestate in his life-time to be due.

The settlement of defendant's intestate was had on Feb. 3, 1868, and shows a balance due the estate of said Emma of \$234 05, one-half of which belonged to plaintiff as distributee and the other half to his sister, Mrs. Partee. The defendant's intestate died in 1870, and on Nov. 9, 1870, the defendant was qualified as his administrator. This action was begun on May 3, 1875, more than two years and six months, as will be observed, from the qualification of the defendant. He relied upon the statute of limitations of two years and six months as a bar to the remedy. The case was submitted to the Circuit Judge without a jury, who was of opinion, from the proof, that the bar of the statute was saved by a request for delay on the part of the defendant made before the lapse of the prescribed period of the statute had expired. He accordingly rendered judgment for the plaintiff, from which the defendant has appealed in error. The statute relied on to obviate the bar is in these words: "If any creditor, after making demand of his debt or claim, delay to bring suit for a definite time, at the special request of the executor or administrator, the time of such delay shall not be counted in said periods of limitations. Code, § 2,280.

Another section of the Code is as follows: "Any delay granted by the person entitled to sue, at the special request of the personal representative, shall not be counted in the time," etc. Code, § 2,785. These sections of the Code of 1858 were brought into it from the proviso to section 4 of the act of 1789, ch. 23, prescribing the period within which actions must be brought against the representatives of deceased persons. Under these provisions it has been held that the request for delay must be special and for a definite time, or until the happening of a certain event. *F. and M. Bank v. Leath*, 11 Humph., 515. *Birdsong v. Birdsong*, 2 Head, 603. *Trott v. West*, 9 Yerg., 433. Thus a request for delay until the personal representative shall collect the debts of the estate, or until he can collect the money, is sufficiently definite. 1 Sneed, 470, or until the land bought by the testator should be paid for. *Pucket v. James*, 2 Humph. 565. It is manifest from these decisions that there has been a departure from the

strict letter of the statute in order to administer it in its spirit, and to meet the right and justice of the case as they may arise. The facts of this case are, that there were but two distributees of the fund, the plaintiff and his sister, Mrs. Partee, the latter a resident of the State of Mississippi. In the summer of 1872 the defendant sought an interview with the plaintiff, upon the subject of a settlement, remarking to him that he wanted to settle the matter, but did not wish to do so until he could settle with both of the distributees at once, claiming that Mrs. Partee was owing his father's estate, and that he wanted to settle the whole matter at once. The clear import of defendant's language was that he would settle as soon as Mrs. Partee came up from Mississippi. No express request for delay was made, further than these words import. The plaintiff said to defendant during the interview, in substance, that the settlement of his interest would in no manner interfere with the defendant's settlement with Mrs. Partee. The latter did come into the neighborhood some time afterwards, but the defendant failed to have a settlement with her, and has failed and refused thus far to pay the plaintiff his share of the fund. The plaintiff being his own witness, states that the settlement with him was deferred at the request of defendant until a settlement could also be had with Mrs. Partee, and it was the understanding of plaintiff that the settlement with him was deferred by defendant until Mrs. Partee should come up, and then the whole matter could be settled at once. He states further that defendant did not request delay from him as to said settlement to any specific or definite time, nor did he promise to pay the claim in any other or further manner than the statement that he wanted to settle the whole matter at once. "He told me," says the plaintiff, "that he wanted to settle the whole matter at once, but did not request any delay, or ask me not to bring suit for my share." The defendant was also a witness, and his testimony is but slightly variant from that of the plaintiff. Are the facts sufficient to save the bar of the statute? Certainly the judgment below accords with the right and justice of the case. The statute was never intended as a decoy duck or a snare, by which to entrap the unwary and credulous creditor, and when such a case is presented, if clearly within the equity of the statute, no refined and technical construction should be allowed to defeat the right.

In one of the cases cited it was settled that to speak of the claim and desire its payment is a sufficient demand in the sense of the statute. *Puckett v. James*, 2 Humph. 567. We need not go a step farther in holding upon equal reason that a negotiation

by the administrator with the creditor about the claim in which it is understood that the administrator wishes to defer a settlement for a definite time, or until the happening of a certain possible event, is a sufficient request for delay in the sense of the statute. The object of the statute was to relax the operation of the statute of limitations for the benefit of the creditor as well as of the estate, and in the interest of common honesty and justice. After the administrator has negotiated for delay and obtained it, with or without a special verbal request, and the effect of it has been to paralyze the vigilance of the creditor, and the administrator seeks advantage of his own wrong, certainly the statute must be held to protect the creditor and save the bar. In such a case we hold that the spirit of the law is answered.

Affirm the judgment.

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THE MEMPHIS & CHARLESTON RAILROAD CO., *in error*, v. HOLLOWAY & TATUM.

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1. RAILROAD—LIABILITY OF CONNECTING LINES—WHEN PLACE OF LOSS IS UNKNOWN—ONUS OF PROOF—UPON CARRIER—WHEN.—If the delivery of goods to a connecting carrier can be shown, such company becomes liable to the owner or shipper for all damage and losses occasioned by negligence, subject at most only to the limitations stipulated for in its behalf by the first company, and the duty of tracing the loss, and fixing it upon the party first liable is put upon the carrier.

CASES CITED.—E. T. & Va. R. R. Co. v. Rogers & Hartsill, 6 Heisk. 143; W. & A. R. R. v. McElnee, 6 Heisk. 208; Fustenheim v. M. & C. R. R. Co.

2. NOTICE—GIVEN IN REASONABLE TIME—AFTER DISCOVERY OF LOSS—SUFFICIENT.—Where the extent of damage or loss is of such a nature as to be difficult of ascertainment, if notice be given in reasonable time after the facts are known, is sufficient.—[ED.]

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Jackson, May 19, 1877.

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M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

This suit was commenced by Holloway & Tatum against the M. & C. R. R. Co. before a Justice of the Peace; upon appeal to the Circuit Court the cause was, by consent, submitted to the Judge, a jury being waived, judgment was rendered for the plaintiffs, and the defendant has appealed.



The case is this: Holloway & Tatum purchased of a firm in Cincinnati a bill of goods, which were properly packed in boxes or cases, directed to the plaintiffs at Somerville, Tenn., and delivered to the Louisville, Cincinnati & Lexington R. R. Co., which company gave a receipt specifying that the goods were "to be transported and delivered in like good order to Louisville & Nashville R. R. Co. at Louisville, subject to certain conditions noted." One of the conditions is, that the liability of said company shall terminate (except as to guaranty of rates of freight) upon the delivery of the goods to the next line of transportation.

The boxes or packages passed in due time over the intermediate lines and came to the possession of the Memphis & Charleston R. R. at Grand Junction, and from thence were carried by said road to Somerville and there delivered to the plaintiffs, who, at the time, made no objection, paying the freight in full; but upon opening the boxes they discovered that part of the goods were missing; they thereupon wrote to the firm of whom they purchased the goods to ascertain if the missing goods were certainly packed in the boxes; they were informed that the goods were certainly packed. The reply to their letter was delayed some four weeks, and they, thereupon, within six weeks from the receipt of the boxes, notified the M. & C. R. R. Co. of the loss, and made demand for payment, which, being refused, this action was brought.

It was admitted "that the goods were lost some where between Cincinnati and Somerville, but where is not known." Upon these facts are the plaintiffs entitled to recover?

It is argued that no action can be maintained against the defendant, because there is no privity of contract between plaintiffs and the defendant; that the contract of shipment was alone with the first road and the suit alone can be against that company.

We have held that where goods are shipped to a point beyond the terminus of the first road the first carrier is still responsible for the delivery of the goods at their destination, unless this liability is limited by special contract.—*E. T. & Va. R. R. Co. v. Rogers & Hartsill*, 6 Heisk. 143; *W. & A. R. R. v. McElnee*, 6 Heisk. 208. But it would not necessarily follow from this that the owner of the goods might not also maintain an action against a connecting carrier if he could show that the goods came to his possession and were lost by his neglect. The case of *Fustenheim v. M. & C. R. R. Co.*, decided by this Court at the April term, 1872, is relied upon, but is not authority for the position contended for. In that case a passenger purchased a through

coupon ticket from New York to Memphis and received a check for his baggage to be delivered at Memphis; his baggage was delivered at Memphis but had been broken open and robbed, as was admitted, *while on the first line of railroad*. It was held there was no such privity between the party as to hold the last line of the road liable for a loss admitted to have occurred by the fault of the first line of the road. But there is no intimation that an action might not have been maintained against the last company for any default upon its part. We hold that upon the delivering of the goods to the M. & C. R. R. Co. it became liable, as a common carrier, subject at most only to the limitation stipulated for in its behalf by the first company, some of the stipulations contained in the receipt, are in behalf of the first road and connecting lines.

The only difficulty we see in the way of recovery is as to whom the *onus* of proof is upon in regard to where the loss occurred. It is admitted that it is not known where the loss occurred—whether before or after the goods came to the possession of the M. & C. R. R. Co. It is argued that as it is not known that the loss occurred by the default of the defendants, there can be no recovery. This would certainly be the general principle as to other transactions.

It is admitted, however, that as the goods were lost in transportation, some one of the connecting lines is responsible for the loss. It is impossible for the plaintiffs to show where the loss of the goods occurred. The cases were all delivered, but one had been opened and part of the goods taken out. If the action had been brought against either of the other carriers the same difficulty would exist. They could show that the cases were delivered to the M. & C. R. R. Co. In view of the fact that railroad companies have these matters entirely in their control, that it is almost impossible for the owner to get the information which the companies may get in regard to the loss of goods, we think the shipper or owner shall not lose his goods because of his inability to show where the loss occurred, and as the defendant admits the receipt of the cases without objection from the other companies, we hold it liable. Upon grounds of public policy it is better to put upon the carrier the duty of tracing up the loss and fixing it upon the party first liable than to put the duty upon the owner.

It is next objected that the receipt contains a stipulation that claims for loss or damages must be made at the time of the delivery of the goods to the consignee, and the claim was not

made in this case for near six weeks. The damage or loss was of a nature not to be definitely known until the boxes were opened, and even then the plaintiffs did not know that the goods had been actually packed, and could not certainly know the extent of the loss; the notice was given in a reasonable time after the facts were known, and this we hold to be sufficient.

Affirm the judgment.

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P. B. WILLS, *et al.*, v. W. A. WHITMORE, *et al.*

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Jackson, May 12, 1877.

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**ASSIGNMENT PENDENTE LITE—COURT NOT BOUND TO NOTICE.**—A Court is not bound to notice an assignment *pendente lite*, and all interests of a complainant, under a decree in his favor, will enure to the benefit of the assignee. A complainant's want of interest in the subject matter, at the rendition of the decree, is not sufficient ground upon which to base a petition for rehearing in behalf of defendant.

CASE CITED.—Story Eq. P. S. 156.—[Ed. 12-537]

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DEADERICK, C. J., DELIVERED THE OPINION OF THE COURT.

Defendants, Whitmore Brothers, as partners, brought two suits at law in the name of Saunders, Clarke Co., for their use against the complainants, Wills & Bingham, as partners.

They obtained judgments, but the judgments were set aside, whereupon the Circuit Judge, by consent of parties, transferred the causes to the Chancery Court, upon the grounds that the matters in controversy were better suited to the peculiar jurisdiction of that Court. Complainants, Wills & Bingham, then filed their bill, alleging that Whitmore, as assignee of Saunders, Clark & Co., claimed that they were indebted to them, whereas said Saunders, Clark & Co., were indebted to the said B. P. Wills & Co., and that the said Whitmore Bros. were indebted to complainants for certain articles of furniture and printing materials and fixtures. For all of which they prayed that defendants be required to account, and for a decree for such sum as might be ascertained to be due to them.

Respondents answered the bill, admitting that the accounts

sued on in the Law Court had been transferred to them by Saunders, Clark & Co., and insisting that complainants were indebted to Saunders, Clark & Co., upon a fair settlement of the accounts between them, and agreeing that the account prayed for by complainants should be taken. They also admitted that some old material passed into their hands belonging to complainants; that they were of small value, and after allowing every credit they are entitled to, they will still be largely indebted to defendants, and praying for an account and decree.

An account was accordingly ordered, and the Master reported \$1,137 59 due to complainants.

Of this sum \$962 was allowed for the furniture and printing materials, etc., including interest from Dec. 1, 1861, to date of report; and the residue, \$175 12 for the excess of complainants' account over that of Saunders, Clark & Co.

Exceptions were filed by the defendants and overruled except as to the piece of furniture, etc.

As to these items the Chancellor was of opinion that their value as shown by the evidence was \$370, with interest thereon from Sept. 1, 1865, the date at which said property went into their possession. No decree was rendered for the excess of complainants' account over that of Saunders, Clark & Co. against them, but only for the \$370 and interest \$144 30, making in all \$514 30.

This result is sustained by the evidence. The charge is distinctly made in the bill that defendants were liable to account for the value of the furniture, printing material, etc., and the answer virtually admits the liability, but contests the value assumed in the bill.

The final decree was rendered March 4, 1872, and upon its rendition James I. Pearce presented in court an assignment of the claims of defendant and asked leave to file the same, which was granted; and it was further ordered that the amount of the decree, when collected, should be paid to said Pearce, and this leave and order was appended to and made part of said final decree.

A petition to rehear was presented, stating the assignment, and insisting that the decree was erroneous, because the assignment, bearing date July, 1871, shows that complainants had no interest in the subject matter of the suit, when the decree in their favor was pronounced.

The rehearing was granted, and Pearce, upon his petition, had an order to change the style of the suit so as to stand in the name of complainants for the use of said Pearce. After a de-

murrer to Pearce's petition the cause was again heard and the former decree sustained and affirmed.

In our view the Chancellor's decree of March 4 was correct. It was not necessary to take any notice of the assignment made to Pearce *pendente lite*. Story Eq. P. S. 156.

Defendants' indebtedness to complainant was ascertained and decreed by the court by the decree of March 4. It was not material to their rights to whom it was assigned or to whom decreed, so that they were protected against any future claim upon the same cause of action, as they were fully in this case.

The Chancellor's decree will be affirmed with costs.

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## FEATHERSTON & ADKIN *vs.* JAMES BOAZ, *et als*

Jackson, June 2, 1877.

1. LIEN—PASSES BY ASSIGNMENT OF NOTE—WHEN.—Where a deed to land retains upon its face a lien for purchase money, an assignment of the vendee's notes will pass the lien, with all the rights of the assignor against the land, and the assignee will have the same power to sell the land in its enforcement, and in the same way, as the vendor might have done, had he retained the notes.

CASES CITED.—Graham v. McCampbell, Meigs R. 55-56; Green v. Demoss, 10 Hum. 374.

2. DOWER.—The dower, in such land, entitles the widow to only one-third of the surplus, after the note has been liquidated, her interest being subordinate to its payment.

CASE CITED.—Williams v. Wood, 1 Hum. 414.

*Cited in 3d, 350,  
" " " 361.*

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FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

This is a bill filed by assignees of two notes given for purchase money of lands, to enforce a vendor's lien retained in the face of the deed in these words: "A lien is retained on the land until the purchase money is paid to the said James R. Beatty," who was the original vendor.

Only two questions are presented for decision in the case:

First. Does this lien pass by assignment of the notes to the assignee, with all the rights of the assignor against the land?

To this question we answer it does, for the following reasons: It is a principle hardly fairly admitting of an exception that the

transfer of a debt carries with it all the securities taken for the payment of said debt that are the result of a contract for such security. See *Graham vs. McCampbell*, Meigs R., 55-56, top p. C. Ed. and cases cited. In this and the cases cited, as well as in all cases of retention of the legal title as security for the purchase money, it has been uniformly held, the lien passes to the assignee of the note given for the purchase money by the vendee. What can be the difference in principle between a security thus retained and one of a slightly different character, only but practically amounting to the same thing in substance, to wit, a lien expressly retained on the face of the deed? We confess we are unable to see any. Each in the hands of the vendor is a security retained by contract for payment of the price of the land. Each is a valuable adjunct to the debt, an element of its value, in fact giving the note a market value above and in addition to one in which the solvency of the maker alone is to be relied on. In this commercial age, when the policy of the law, based on the demands of a trading, enterprising people, is most favorable to the free circulation of such paper, it would be to go in the face of that policy to hold that such paper did not carry this element of value with it. Practically it would be to deprive the owner of the right to realize this element of value in his note if he could not transfer it, and if this right be conceded, then no reason can be given why it should not pass under the general principle stated, or why it should be made an exception. We have said in several cases that while we adhered to the principle of the case of *Green vs. Demoss*, 10 Hum. 374, that the implied lien of a vendor did not pass by transfer of the note to the assignee by virtue of the simple assignment or endorsement, yet the vendor might by contract expressly transferring such lien, pass it as well as any other right or element adding value to the paper. That no rule of law or public policy forbade such an assignment. If such a lien as this, the implied one may be transferred, surely one sustained by express contract may be, and should pass as any other security, such as a mortgage, by transfer of the debt to which it is an incident and for the security of which it is retained in the one case and given in the other. We are well satisfied with the correctness of this view, and that the Chancellor correctly gave the benefit of the lien to the assignees in this case. We may add here that this lien gives the precise same rights to sell the land in its enforcement, and in the same way to the assignee as the vendor might have done, had he retained the note.

The other question presented is, as to the right of the widow of

the vendee to dower as against the assignee who is seeking by bill to enforce this lien. We have so often decided (following our own cases on the subject) that as against the vendor, her dower right was subordinate to the payment of the purchase money, that we do not deem it proper again to discuss the question. This being so, her rights are certainly no higher against the assignee who holds the same contract and stands in the same rights as we have laid down above.

As to the question suggested that she is to have the entire value of her dower in the surplus and not be endowed of one-third of it, we have settled in a case unreported, indeed in several of them, that the latter is the rule, and see no cause to further review the question. The rule laid down in *Williams vs. Woods*, 1st Hum. 414, that she was entitled to one-third of the surplus after paying the purchase money for life as dower, has been uniformly followed, and we feel no disposition to disturb it. The result is that the decree of the Chancellor in both the original and cross bill is affirmed.

The Clerk of this Court will sell the land unless purchase money is paid in 90 days from this date. Costs of the original bill will be paid out of the fund, costs of the cross-bill by the complainant in the same.

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## UNION BANK v. J. J. RAWLINGS.

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**Jackson, April Term, 1877.**

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1. **BILL OF EXCHANGE—DEMAND AND NOTICE—DRAWER NOT BOUND BY PROMISE TO PAY AFTER DISHONOR—WHEN.**—Where the drawer of a bill of exchange is discharged by neglect of the endorsee, to give notice of non-payment, no promise to pay will be binding upon him, unless it be shown by satisfactory proof that the subsequent promise was made, with a full knowledge of his discharge. It is wholly immaterial whether his ignorance of release resulted, from an ignorance of the law or facts, that removed his liability.

**CASES CITED.**—*Spurlock v. Union Bank*, 4 Hum. 336; *Golladay, Cheatham & Co. v. The Bank of the Union*, 2 Head. 58; *Ford v. Dallam*, 3 Cold. 67; *Story on Prom. Notes*, §§ 275, 362; *Low v. Howard*, 10 Cush. 159; *Warder v. Tucker*, 7 Mass. 449; *Freeman v. Boynton*, 7 Mass. 483; *Fleming v. McClure*, 1 Brev. So. Rep. 428; *Miller v. Hackley Auction*, N. Y. S. C. Rep. 68.

2. **NOTICE—OF DEMAND AND PROTEST—DRAWER OF BILL OF EXCHANGE IS ENTITLED TO—WHEN.**—The drawer of a bill of exchange is entitled to notice of

demand and protest, if at the time the bill was drawn, he had reasonable grounds to expect its acceptance. Upon the following state of facts, the Court held, he had reasonable grounds: Between the drawer and acceptor there had been a long series of transactions; the acceptors had received from the drawer, at different times, large consignments of cotton; the drawer had, from time to time, drawn upon said cotton; the acceptors had long been in the habit of accepting the drawer's draft; the acceptors had in their possession cotton belonging to the drawer while the bill of exchange was maturing in their hands, and they had instructions to sell the same to meet the bill.

CASES CITED.—1 Pars. on Bills and Notes 535, 540; *Oliver v. Bank of Tenn.*, 11 Hum. 74; 2 Brock 20; 9 Gill. 350; 12 Rob. La. 231; 3 La. Ann. 385; 8 Pick. 79; 10 Pet. 572; *Edwards on Bills* 601, 602, 603; *Chitty on Bills* 357a, 339; *Smith's Mercantile Law* 252; *Bagnell v. Andrews*, 7 Bing. 109; *Story on Bills*, § 311; *Mobly v. Clark*, 28 Barb. 390.

3. ACCOMMODATION ACCEPTANCE.—WHAT CONSTITUTES, NOT A MATTER OF FACT FOR A JURY.—What constitutes an accommodation acceptance is not properly a matter of fact for a jury, but a conclusion of law upon a certain state of facts to be found by the jury. An acceptance under the circumstances of such facts, as stated in the 2nd head above, is held, not to be an accommodation acceptance.

Freeman, J., dissents upon the question of the drawer's liability growing out of promise to pay after dishonor of bill.—[ED.]

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SNEED, J., DELIVERED THE OPINION OF THE COURT.

The action is upon a bill of exchange for \$10,958.50 drawn by the defendant, Rawlings, at Memphis, Tenn., on M. D. Cooper & Co., commission merchants in New Orleans, and accepted by them. The bill was drawn on the 11th of November, 1861, at six months, and is payable to the order of the drawer, and was by him endorsed to the plaintiff. The verdict and judgment below were for the defendant, and appeal in error by the plaintiff.

The bill sued on was the last of a series of like transactions between the defendant and M. D. Cooper & Co., who were his merchants and factors at New Orleans, all other bills having been paid or renewed at maturity. When the first bill was drawn, early in 1861, the defendant had in the hands of his said factors 654 bales of cotton—the first bill being for \$10,000. The said M. D. Cooper & Co. were instructed by the defendant to sell the cotton and meet the bills. They did sell about 435 bales. When the bill sued on was drawn the said acceptors had in their hands some 235 bales of the defendant's cotton, which they were instructed to sell and meet the bill. These instructions were never withdrawn, but there was no sale for the reason, as alleged by said acceptors, that there was no market. In the summer of 1862, about the middle of the month of July, as the defendant remembers, he was informed at Memphis by Frierson, a member of the firm of M. D. Cooper & Co., that the 235 bales of cotton so shipped to the acceptors at New Orleans had been burned by the Confederates on the approach of the Federal forces to New



Orleans. The exact date of the destruction of the cotton does not appear, but it does not appear that the Federal forces captured the city of New Orleans between the 24th of April and the 1st of May, 1862. In the same conversation the said Frierson told the defendant not to be uneasy about the cotton, as the house of M. D. Cooper & Co. would hold the warehouseman who held in storage at the time of its destruction liable for its value. These facts are shown in the testimony of the defendant himself, and it appears in the testimony of F. H. Smith, the plaintiff's witness, that the defendant made to him substantially the same statements in their negotiations about the payment of the bill, in reference, especially, to the time when Frierson advised him of the destruction of the cotton. These are facts and testimony in the case, however tending to show that Frierson, having been in Memphis as early as the 6th of June, 1862, *may* have imparted said information at an earlier day, but the only affirmative testimony that assumes to identify approximately the date is that of the defendant himself. As will be seen, the bill matured on the 14th of May, 1862. New Orleans, the residence of the acceptors, being then in the possession of the U. S. forces, and Memphis the residence of the defendant, remaining in the possession of the Confederates until June 5th, 1862, when it was captured by the Federals. In May, 1862, the assets of the plaintiff, including the first of exchange of the bill in suit, were, by orders of the Confederate authorities, carried South. But the cashier of the bank, with the second of the bill and a descriptive list of this and other like *choses in actions* belonging to the bank, remained in Memphis, and was certainly there between the 6th of June, 1862, and the 31st of March, 1863, when commercial intercourse by mail and by express, *via* Cairo and New York, was open safe and lawful between Memphis and New Orleans. There was no presentment or demand for payment made until May, 1865, when the said cashier took the second of exchange, with others, to New Orleans, where demand and the bill protested for non-payment, and notice thereof sent to defendant. In July of the same year the assets of the bank having been brought back to Tennessee, the first of exchange was in like manner sent to New Orleans protested and notice given. It is not very seriously insisted that these protests, etc., were valid and sufficient to fix the liability of the defendant. No legal excuse is shown for the laches of the plaintiff between the 6th of June, 1862, and the 31st of March, 1863, when, according to the proclamation of the President of the United States, inter-

course *was* lawful between the two cities, and when, as the proof shows, it was both practicable and safe.

The defence relied upon by the defendant is, that by the law merchant he is discharged from all liability on this bill by the *laches* of the plaintiff. Upon the foregoing facts he certainly would be, but the plaintiff contends that he has made himself liable by a subsequent promise to pay the bill, "having full knowledge," as averred in the declaration of the want of due presentment, protest and notice, "and that he was discharged by reason of such laches from liability to pay said bill." The plaintiff contends further that this is purely an accommodation bill, and that no demand, protest and notice was in such case necessary to fix and determine the liability of the defendant. We will consider these propositions in the order in which they are stated.

In regard to defendant's promise, after the protest of May and July, 1865, it is shown by the testimony of the plaintiff, and by that of the defendant also, that the defendant did several times promise to pay the bill, and had actually made arrangements with his Memphis banker for the purchase of the notes of the plaintiff for that purpose. On the occasion of one of these said promises to pay the bill, he, the defendant, was asked by the counsel for the plaintiff if he had consulted his counsel as to his liability on the bill. He answered that he had not. Afterwards, in the winter of 1867, the defendant being very ill, sent for his counsel to advise with him about his business affairs, and in the course of this interview he was advised by his counsel that he was not bound upon the bill, and that in law he was discharged by the laches of the plaintiff. After this he refused to pay the bill, and continually denied his liability. He states that when he made the promise he thought he was bound in law to pay, and when he ascertained that he was not, he refused to pay. This fact is fully shown in the testimony of both the plaintiff and the defendant. The court charged the jury in substance, that if the plaintiff's promise to pay was made in ignorance of the legal effect of the laches of the plaintiff, by which he was in law discharged from all liability in the bill, the promise would not be binding upon him. And such is the settled doctrine of this court. The plaintiff has cited the decisions of several courts, both English and American, holding otherwise; and it seems that the current of authority outside of Tennessee, maintains the opposite view. In the case of *Spurlock vs. the Union Bank*, 4 Humph. 336, decided in 1843, this court held that to render an endorser

liable who is discharged by the neglect of the holder to give notice, there must be satisfactory proof to show that the subsequent promise to pay was made with a full knowledge of the discharge. It must not be left to surmise. It is wholly immaterial whether his ignorance of his discharge was the result of his ignorance of the law or the facts which discharged him. In that case the court say, Turley, J., delivering the opinion: "We cannot say from the proof that the promise and admission were made upon full and ample knowledge of his discharge from his liability as endorser. The mass of mankind know but little of commercial usage upon commercial paper, and upon questions of liability have to depend upon legal advice." . . . . . If an endorser believe facts to exist which charge him, which do not exist, or if he believe facts which do exist charge him, which do not charge him, and in a misapprehension as to the operation of the law upon his case, thus supposed, he promised to pay, he will not be held to his promise." Id. 337.

The same doctrine was announced in *Golladay, Cheatham & Co. vs. The Bank of the Union*, 2 Head, 58, in these words: "If the drawer of a bill, with the knowledge that he is discharged from its payment for want of notice, acknowledge the debt and promise to pay it, he thereby waives demand and notice, and is liable for the same;" and it is again followed in *Ford vs. Dallam*, 3 Cold. 67. Mr. Story questions the soundness of the opposite doctrine in his work on promissory notes, while admitting that it is the general doctrine of the English and American Courts.—*Story on Prom. Notes*, §§ 275, 362. Though it does seem that the general current of authority in other states is the other way, yet we find many respectable authorities maintaining the doctrine of our own Court. Thus, in the case of *Low v. Howard*, 10 Cush. 159, where the Judge at *Nisi Prius* charged the jury that though it was generally true that a promise by an endorser to pay the note when there had been no demand and no notice of discharge, would be held to be a waiver thereof if these facts were known to him, yet the rule would not apply to a case where other material circumstances existed, the knowledge of which was essential to a full understanding of his rights and obligations. Shaw, C. J., said: "We think the directions were right.

The legal foundation of the doctrine of waiver is, that a party knowing his rights voluntarily consents to forego them. Knowledge of all the material facts on which those rights depend is essential to a valid waiver. In *Warder v. Tucker*, 7 Mass. 449, it was said that although the defendant, when he first received

notice from the plaintiffs of the protest of the bill, considered himself as liable by law to pay the plaintiff the amount of it, yet his ignorance of the law shall not bind him to fulfill an engagement made through mistake of law." In *Freeman v. Boynton*, 7 Mass. 483, Parker, J., said: "Nor will any supposed acknowledgement of the indorser that he was liable to pay the note avail the plaintiffs in the present case. The facts reported do not show any direct promise to pay, and even if they did, it is well settled that a promise to pay, under such circumstances as show an ignorance that the party was legally discharged, is without consideration, and void—citing *Fleming v. McClure*, 1 Brev. So. Rep. 428. In *Miller v. Hackley Auction*, N. Y. S. C. Rep. 68, it was said, by Thompson, J., "that a promise may amount to a waiver in a case like the present, enough must appear to render it justly presumable that the defendant at the time knew the fact of the want of notice and also knew his legal rights."

We are aware that in many of the commercial States this doctrine has been repudiated, but we are inclined to think it is founded in good reason, and is certainly most consonant with the most obvious rule of right, that a party shall not be held to have waived a right if he did not know that it was right. It has, at all events, been the law of this State for nearly forty years, and has been followed in all our cases reported and unreported in which this question was involved, and we are not disposed to unsettle our decisions at this late day by departing from it.

It is insisted that the acceptance in this case was purely an accommodation acceptance, and that the defendant was not entitled to notice of demand and non-payment as he could not be injured by the want of it. This issue is tendered by the second count of the declaration which excuses the want of protest and notice, on the ground that it was purely an accommodation acceptance, and that from the time of the drawing of the bill and henceforward, and until maturity, the said acceptors had not in their hands any funds or effects of defendant, nor had they received from defendant any consideration for the payment of said bill, nor has the defendant sustained any injury or damage by reason of his not having notice of the non-payment of said bill. Upon this issue, as we have seen, the proof establishes that between the defendant and the acceptors in this case there had been a long series of transactions; that they were the factors of the defendant; had received from him, at different times, large consignments of cotton; that the defendant had, from time to

time drawn upon said cotton; that they had long been in the habit of accepting his drafts; that at the time the bill in controversy was drawn, and for at least five months of the time while it was running to maturity, they had in their hands not less than 230 bales of cotton, and that they had standing instructions to sell the cotton to meet this bill. The court charged the jury that if the defendant had reasonable grounds to believe from past transactions between himself and the acceptors, or from other circumstances that they would pay the bill at maturity, then, although it might have been an accommodation acceptance, the drawer would be entitled to demand protest and notice. The court further charged that whether the acceptance was an accommodation acceptance or not, the drawer was entitled to demand protest and notice, if you find that at the date the bill was drawn the drawer had cotton in the hands of the acceptors to meet it, whether the cotton was insufficient or not, or whether it was subsequently destroyed or not. It is insisted that by this and other portions of the charge the court withdrew from the consideration of the jury the question whether this was or was not an accommodation acceptance. The court has sufficiently and very plainly defined what is an accommodation acceptance, and what facts are necessary to be found to exist in order to make it an accommodation acceptance, and has properly drawn the distinction between a technical accommodation acceptance, in which no protest and notice were necessary, and a *quasi* accommodation acceptance in which it is a well settled doctrine of the law merchant that certain elements may enter into it which in all such cases entitles the party to demand protest and notice. What constitutes an accommodation acceptance is not properly a matter of fact for a jury, but a conclusion of law upon a certain state of facts to be found by the jury. It seems to us that the question has been properly submitted to the jury in this case. The best key to the solution of the question whether the drawee of a bill of exchange has a right to demand protest and notice is, at the time the bill was drawn did he have a right to draw? We are of opinion that the acceptance in this case was not an accommodation acceptance in the sense insisted on by the learned counsel of the plaintiff, and that the defendant was entitled by law to the common prerequisites of due demand, protest and notice to fix his liability upon this bill. It is an elementary principle which seems to be recognized in all the books that if the drawer had reasonable ground to expect that the bill would be honored, then he had a right to draw, and if he had a right to

draw, he had a right to expect due notice of protest and dishonor. The reasonableness of his expectation is ordinarily a question of law, but when the proof is contradictory and the facts equivocal, it is a mixed question of law and fact.

A prominent instance given in the books where the drawer may have good reason to expect that the bill will be honored, is where he has consigned goods to the drawer, although the consignment may, by accident or otherwise, not have come into the possession of the drawee, or may, by depreciation in value or other loss, have become insufficient to cover the amount of the bill.—1 Pars. Bills and Notes 535, 540; *Oliver v. Bank of Tenn.*, 11 Hump. 74; 2 Brock. 20; 9 Gill. 350; 3 La. Ann. 385; 8 Pick. 79; 10 Pet. 572. Mr. Edwards, after discussing at length the question, and especially as to the exceptions to the general rule that notice of the dishonor of a bill must be given to the drawer, proceeds to discuss the exception where the drawer has no funds or effects in the hands of the drawee, and says that to this exception there are some important modifications: "If the drawer has made, or is making, an assignment to the drawee and draws before the consignment comes to hand, or if the goods are *in transitu*, but the bill of lading is omitted to be sent to the consignee, or the goods are lost, or if the drawer has any funds or property in the hands of the drawee, or there is a fluctuating balance between them in the course of their transactions, or if there is a running account between the drawer and the drawee, and the latter has been in the habit of accepting the bills of the drawee without regard to the state of accounts between them, or if the drawer has a reasonable expectation that the bill will be paid, he is entitled to notice of dishonor. In all such cases the drawer is considered as justified in drawing. \*

\* \* And where the drawing is a fair commercial transaction in which the drawer has a reasonable expectation that his bill will be honored, he is entitled to the same notice as a drawer with funds, or authority to draw without funds."—Edwards on Bills 601-602. And again, says the same author, "if the drawee acts upon a fair presumption he is entitled to notice, notwithstanding it turns out that he had in fact no funds on which to draw; as where he draws upon consignments of goods made from time to time and the want of funds to meet the last bill proceeds from a fall in the price of them. If he have effects in the hands of the drawee at any time before the bill matures, he is entitled to notice, though they be not sufficient to meet the bill."—*Id.* 603. Mr. Chitty states the doctrine thus: "If at

any time between the drawing and presentment and dishonor of a bill, the drawee had *some effects* of the drawer in his hands, though insufficient to pay the amount, he will, nevertheless, be entitled to notice of the dishonor. For this case, says the author, differs from that where there are no effects whatever of the drawer in the hands of the drawee at the time, because the drawer must know that he is drawing upon accommodation, and without any reasonable expectation that the bill will be honored. But if he have effects at the time it would be dangerous and inconvenient, merely on account of the shifting of a balance, to hold notice not to be necessary. It would be introducing a number of collateral issues upon every case of a bill of exchange to examine how accounts stood between the drawer and drawee from the time the bill was drawn to the time of dishor. Actual value in the hands of the drawee at the time of drawing is not necessary to entitle the drawee to notice. If he had consigned goods to pay the bill, though they may not have come to hand at the time of presentation for acceptance.—Chitty on Bills 357a, 359.

The drawee is entitled to notice of dishonor, says Smith's Mercantile Law, if he had effects on their way to the drawee, or if, on taking up the bill, he could sue the acceptor or any other party, or had effects in the hands of the drawee at the time the bill was drawn, or when it was presented for acceptance, or afterwards, but before it became due, though the effects were less than the amount of the bill, and the drawee was indebted to the acceptor in a larger amount than their value; in a word, if he have any reasonable ground to expect that the bill will be paid, he is entitled to notice.—Smith's Mer. Law 252; Bagnel v. Andrews, 7 B'ng. 109. This seems to be the universal doctrine of the law merchant on this subject.

It is argued that the defendant was not in any way injured by want of notice in this case, and hence no notice was necessary. How do we know that? What right have we to speculate upon an abstract question like that, when we have the law thus plainly written? It is the introduction of just such collateral issues as Mr. Chitty deprecates in the above cited passage which would destroy the unity and symmetry of our system of commercial jurisprudence, and encumberr the law merchant with such embarrassment as would greatly depreciate its value to the commerce of the world. The opposite doctrine from that which governs this case is very well established and well understood.

It is thus stated by Mr. Story: "If the drawee has no right

to draw the bill, or no reasonable ground to expect the bill to be accepted, he is not deemed entitled to notice of the dishonor thereof, for it was his own fault to draw the same, and, correctly speaking, he cannot be said to have suffered any loss by the want of notice."—Story on Bills, § 311; *Oliver v. The Bank of Tenn.*, 11 Hump. 74; *Mobly v. Clark*, 28 Barb. 380. But that is not this case, and we can scarcely conceive of two doctrines that stand in clearer antithesis than that last stated, and that we have discussed, as in our judgment, plainly applicable to the facts of this case.

Affirm the judgment.

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DISSENTING OPINION OF FREEMAN, J.

I dissent from the opinion of a majority of the Court on the question that a party who promises to pay after knowledge of the facts which discharge him, such as failure to make demand and give notice of dishonor, or protest a foreign bill, must also be shown to have known, as a matter of law, that these facts discharge him, or the promise will not bind.

I cannot assent to this, because it is opposed to an axiom in our law, that ignorance of law does not excuse any man, and in all departments of law it has always been a presumption that every man knows the law or may do so. In the next place it is utterly impracticable to administer the law on the opposite principle. How is it possible to prove a party knew the law of his case? Who can show, as a matter of testimony, that a man knows the rule of commercial law—that he is discharged by failure to take certain steps to fix his liability? If the party comes in, under our present rule, and swears, as a witness, he did not know he was discharged, it is utterly impossible to contradict him. Practically the rule renders it impossible to bind a party by a new promise. He will, in almost any case, swear he was ignorant of the law, and no counter proof can be made; a rule of law based on proof of facts that can never be met or rebutted, and which can always be made by the defendant, is, to my mind, an incongruity, such as ought not to exist in any system of jurisprudence, and can never be made sound by any number of decisions to that effect. I may add, that the weight of authority is as overwhelming against the proposition as the reasoning is conclusive against it.

In addition, I do not think our own cases relied on, when fairly construed in connection with these facts, necessarily hold



this doctrine, nor, as I think, any of the cases cited would, on these facts, sustain such a view as they are cited to sustain.

I therefore dissent from the opinion on this point, while I agree with it on the other questions, and therefore with the conclusions arrived at on result of the case.

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JOHN C. REEVES, *Executor of* GEORGE W. REEVES, *v.*  
J. L. PULLIAM, *Executor of* W. G. DAY.

Jackson, April Term, 1877.

1. SURETY—LIABILITY OF ON NOTE—THOUGH ADMINISTRATOR OF HIS DECEASED PRINCIPAL IS PROTECTED BY THE STATUTE OF LIMITATIONS.—Although the administrator of a principal in a note may defeat a recovery upon the note by the plea of the statute of limitations, yet the exoneration of such administrator does not relieve the sureties of his intestate from liability.

2. SAME—REMEDY OF SURETY.—When the surety on such a note is compelled to pay the debt, he then has cause of action against the administrator of either the principal for the amount so paid, or the administrator of a co-surety for *pro rata* contribution.

3. SAME—RIGHT OF ACTION ACCRUES—WHEN.—STATUTE OF LIMITATIONS.—While the surety is entitled to his motion, upon rendition of the judgment, yet his cause of action is the payment of the judgment, and the statute begins to run from that time, and not from the rendition of the judgment.

CASES CITED.—Code, Sections 3625, 3625a, 3626, 2279, 2281, 2784, 2786; 10 Yerg. 521; 5 Hum. 629; 9 Yerg. 57; 3 Yerg. 319; 7 Yerg. 165; Bank v. Campbell, 7 Yerg. 353; 8 Hum. 197; 11 Hum. 77; 3 Pars. on Con. 91; 1 Pars. on Con. 35-36.—[Ed.]

DEADERICK, C. J., DELIVERED THE OPINION OF THE COURT.

At the July Term, 1874, of the Circuit Court of Fayette county, Cacke and Dortch, Executors of Josiah Higginson, recovered a judgment against Em J. Reeves, principal, and I. G. Reeves and plaintiff, as sureties.

Defendant, Pulliam's testator, W. G. Day, was a co-surety on the note upon which the judgment was obtained, but was not sued in the action.

Pulliam was qualified as executor of Day's estate in January, 1865, and made his settlement in 1871.

At the July Term, 1871, of said Circuit Court, and after said judgment had been rendered against him, plaintiff entered a motion for judgment over against his principal and co-sureties.

On the 31st of March, 1874, the plaintiff paid \$710.46, the amount of the judgment and interest thereon, and the sum of \$12.80, the costs of suit; and on the 10th July, 1874, he dismissed his motion entered at July Term, 1871, and on the said 10th July, 1874, entered this motion against defendant, the executor of his co-surety, Day.

The defendant relies upon the statutes of limitations of two years and six months, all the parties being residents of said Fayette county, and of seven years as a bar to the recovery.

By secs. 3,625 *j*, 3,625 *a* of the Code, a right to a judgment, by motion, is given to a co-surety against whom judgment has been rendered, or who has paid said judgment or more than his ratable share thereof against all the parties to the instrument for their proportion, whether they were included in said original judgment or not. By the next section, 3,626, this remedy lies both for and against the representatives of deceased parties.

It will be observed that the right to make the motion accrues upon the rendition of the judgment against the surety or upon payment by him of the original judgment, or more than his ratable share of said original judgment.

The right of recovery in this case depends in part upon the question whether the failure to prosecute the motion upon the ground of the rendition of the judgment gives the defendant the right to rely upon the statute of limitations from the time said judgment was rendered against a motion entered and prosecuted against defendant upon the ground that plaintiff had *paid* the judgment, or whether the statutes would begin to run against the latter motion only from the time of the payment of the judgment.

The statutes clearly give the co-surety the right to the motion, upon the payment of the judgment, as a distinct and substantive cause of action. And the statutes of limitation would only run against such cause of action from the time it accrued, and that time would be when the judgment was paid.

This is the construction placed upon Sec. 3,625 of the Code by Judge Caruthers, in his History of Lawsuits, and it is a sound one. See, also, 10 Yerg. 521, where it is expressly adjudicated in conformity to this construction.

In this view, neither sections 2,279, 2,281, 2,784, nor 2,786 being acts of limitations of two and seven years, bars the action in this cause, as these statutes run only when there is a cause of action.—5 Hum. 629; 9 Yerg. 57; 3 Yerg. 319; 7 Yerg. 165.

But it is insisted that the statute of limitations having barred

the original debt against defendant, the Adm'r of the co-surety of plaintiff, it cannot be revived against him by the recovery of a judgment against plaintiff, co-surety of his intestate, and having a complete defence to the original cause of action under the statute of limitation, he cannot be made liable to pay the co-surety any part of the debt due to the original creditor which his co-surety has been compelled to pay.

In the case of *Marshall v. Hudson*, 9 Yerg. 57, this defence made and it was held that the surety was liable, although the admistratrix of the principal had succeeded in defeating the recovery of the creditor against her by the plea of the statute of limitation. The Court held that although she had succeeded in her plea of the statute of limitations against the creditor of her intestate, yet, as soon as Marshall had been compelled, as intestate's surety, to pay the debt, he became her creditor, and was entitled to judgment against her.

It is by the payment of the debt of the principal that the surety becomes creditor of his principal, or his representative, by the express provisions of the statutes, and then his cause of action accrues.—Code, § 3,625, 3,625 *a*; 10 Yerg. 521.

And in 10 Yerg. 521, it is held that the same rule applies as between co-sureties, that when one of the co-sureties has paid the debt he may, within two years from that time, make his motion, or bring his action against the personal representative of the deceased co-surety for contribution; that the act of limitation begins to run against him from the time he paid the judgment, and not from the time the judgment was rendered against him.

So it has been held by successive adjudications of this Court.

1. That although the administrator of a principal in a note may defeat the recovery upon the note by the plea of the statute of limitations, yet the exoneration of such administrator does not relieve the sureties of his intestate from liability.—*Bank v. Campbell*, 7 Yerg. 353.

2. That although the administrator of a deceased principal debtor by note may, by the plea of the statute of limitations, defeat the creditor's recovery against him, yet when the surety on such note is compelled to pay the debt, such surety then has a cause of action against such administrator for the amount so paid. That this cause of action commences in point of time and is founded upon the payment of the debt by him.—*Marshall v. Hudson*, Adm'r, 9 Yerg. 57.

3. That where one of two co-sureties pays a judgment recovered against him, he may have his motion against his co-surety's

executors for contribution within two years from the time he paid the judgment, although more than two years had elapsed from the time of the rendition of the judgment against him, and as it appears more than two years from the qualification of the executor of the deceased co-surety had elapsed.

The cause of action is the payment of the judgment, and the statute of limitations only begins to run from that time.—*Maxey v. Carter*, 10 Yerg. 521.

In the case of *Goss v. Gibson et al.*, complainant filed his bill against his co-sureties for contribution. Complainant and defendant were all co-sureties of one Marshall. In December, 1842, all the defendants were declared bankrupts and discharged from all their debts and liabilities.

In September, 1843, judgments were rendered against the complainant upon claims upon which he and defendants were co-sureties for Marshall, and complainant was compelled to pay them, and then filed his bill for contribution as above stated. Defendants insisted that they were discharged from all liability on said claims by their certificate in bankruptcy. And so they were. But this Court held that at the time of their discharge in bankruptcy the complainant had no debt or demand against them, and the certificate of discharge in bankruptcy was no protection against complainant's right to recover, 8 Hum. 197, that although they were discharged from the debt to the original creditor, when complainant paid that debt as co-surety his right of action accrued against them.

In *Kerr v. Clark*, Clark offered Smith as witness, he and Smith being co-sureties on the note sued on. Smith was not sued and was discharged in bankruptcy from all liability for his debts. He was allowed to testify, over plaintiff's objection, in the Circuit Court, and verdict and judgment were for defendant, and plaintiff appealed to this Court. This Court said: "It is true Smith had been discharged in bankruptcy, and as between himself and the holder of the note he was under no responsibility, but should Clark be compelled to pay the debt as surety he will then have a right of action against Smith for contribution. Clark's right of action would accrue after the discharge in bankruptcy of Smith, and of course would be unaffected by that discharge.—11 Hum. 77.

In these cases the defendants were discharged from the original debts. But the payment of their co-surety gave a cause of action notwithstanding.

Certainly the right to plead the statute of limitations, which

we can see would be a good defence to the original obligation, can constitute no higher or better defence against the action of the co-surety than the actual discharge from such original debt.

The surety's right, who has paid the debt of his co-surety, to recover therefore does not depend upon the payment of a debt which they were jointly bound to pay at the time the payment was made. But upon the fact of their being co-sureties in the obligation which one has been obliged to pay. And when he has paid it, and not before, he has a cause of action. Before judgment or payment one co-surety has no right of action against the other; afterwards he has, by the express terms of the statutes and the repeated adjudications of this Court. Up to such event they both stand as to each other upon a plan of perfect equality. Their creditor may sue either or both, at his option. They cannot dictate to him, and if he sues one and obtains satisfaction out of him, only then such surety has his remedy against his co-sureties.

In 3 Pars. on Con. 91, it is said: "If a surety pays for his principal, the statute begins to run from his first payment for his principal, but as to his claim on a co-surety for contribution, it does not begin only when he begins to pay, but only when his payments amount to more than his share." And again: "The contract upon which the assumpsit is founded, dates *from the time when the relation of co-security or co-obligor is entered into*; although the cause of action does not arise until the payment. Hence the discharge of one of the joint debtors, by whatever cause, from his direct liability to the creditor, does not relieve him in law, any more than in equity, from his obligation to indemnify such of the remaining joint debtors as have borne more than their original proportion of the debt."—1 Pars. on Con. 35-36.

"A party acquires a right to contribution as soon as he pays more than his shares, but not until then, consequently the statute of limitation does not begin to run until then."—Ibid. 36.

The judgment of the Circuit Judge, dismissing plaintiff's action, is erroneous, and is reversed, and the plaintiff is entitled here to judgment for one-third of the judgment and interest and costs recovered off him.

MARY A. McCALLUM *v.* S. M. JOBE.

Jackson, May 19, 1877.

**EVIDENCE—PAROL TESTIMONY ADMISSIBLE TO EXPLAIN THE EFFECT OF A WRITTEN INSTRUMENT—WHEN.**—The defendant, Jobe, endorsed the note in controversy to W. D. McCallum, who transferred the same to the plaintiff, Mary A. At the time the note was purchased by W. D. McCallum the defendant, Jobe, had a mortgage upon valuable real estate to secure it. Upon the same property W. D. McCallum had foreclosed a subsequent mortgage of his own, and became the purchaser himself, and was in the possession under a deed from the trustees. It is alleged, as error, that the Court below, over the objections of the plaintiff, admitted the testimony of the defendant to the effect that when he sold and endorsed the note to W. D. McCallum, there was a distinct understanding between them, that McCallum was buying to relieve his property of this incumbrance upon it, and that the defendant was in no manner to be held liable, and that McCallum was to be substituted to all of Jobe's rights, under the prior mortgage, which was a full indemnity and consideration to McCallum for his outlay for the note. *Held,*

1st. In such a case the testimony was competent, and properly admitted.

**CASES CITED.**—Edwd. on Bills 141, 295, 296, 297.

**2nd. DEBT MERGED BY OPERATION OF LAW.**—By operation of law the debt was merged and extinguished, and there can be no recovery on the note. In such a case the sale of the note carried the security with it, and no paper title was necessary to invest the purchaser with all the benefits of the mortgage.

**CASES CITED.**—Chitty Bills, 60, 142; Duncan, Sherman & Co. v. Gilbert, 5 Dutcher 521; Oliver v. Phelps, Spencer 180; 1 Zab. 597; Chaddock v. Vannep, 35 N. J. 517; 10 Am. Rep. 258; 1 Danl. Neg. Inst., §§ 220, 722; Hill v. Ely, 5 Serg. & Rawl. 366; Cleveland v. Martin, 2 Head. 131; 1 Hil. Moot. 236, 237, 251, 375, 540, 543, 503; Perry on Trusts 318, 351; 7 Hum. 127; 5 Cow. 202; 4 B. Man. 529; 34 Iowa 392; Meigs R. 52; 4 Johns. 43; 15 Mass. 485; 19 Johns. 325; 2 Wash. R. P. 500; 6 Allen 79; 2 Johns. Ch. 128; 10 Paige 255; 6 Yerg. 116; 8 Mass. 493; 22 Peck. 394; 2 Cold. 167; 9 Hum. 726; 20 Penn. 283; 14 Peck. 104; 3 Johns. Ch. 53; 6 Johns. Ch. 417; 1 Allen R. 242; 18 Ves. 384; 20 Mo. 482; 20 Mich. 9; 6 Peck. 492; 3 Cush. 554; 2 Barb. Ch. 618; 51 Ill. 331; 51 N. Y. 333; 10 Paige 595.—[Ed.]

SNEED, J., DELIVERED THE OPINION OF THE COURT.

The action is brought upon a promissory note for five thousand dollars executed by C. Pfannensteihl to the defendant, S. M. Jobe, on the 4th August, 1866, due at twelve months after date and endorsed by Jobe to W. D. McCallum February 21, 1870, and by him to the plaintiff. At the time of the purchase of the note by W. D. McCallum the defendant, Jobe, had a mortgage upon valuable real estate in the city of Memphis to secure it. Upon the same property W. D. McCallum had foreclosed a subsequent mortgage of his own, had become the purchaser himself and was in possession under a deed from the trustees. The verdict and judgment below were for the defendant, and to reverse that judgment the plaintiff has appealed in error. It was insisted upon the trial below that the liability of the defendant as endorser had not been fixed by due and lawful demand and notice, and that by the laches of the plaintiff in this respect the defendant had been discharged. In the view we have taken of the case this question

may well be ignored and pretermitted in the discussion. We may concede for all the purposes of this decision that the demand and notice were proper, regular and lawful, but where it is so plainly manifest upon the merits of the cause, that the exact legal rights of the parties have been attained and the strict law of the case administered by the verdict, we are forbidden to reverse the judgment unless in some manner the merits of the cause have been affected by the error alleged. It is alleged as error that the Court below, over the objections of the plaintiff, admitted the testimony of the defendant to the effect that when he sold and endorsed the note to W. D. McCallum there was a distinct understanding between them that McCallum was buying to relieve his property of this incumbrance upon it, and that the defendant was in no manner to be held liable as endorser, but that the transaction was understood by both parties as a substitution of McCallum to all of Jobe's rights under his prior mortgage, which, as a matter of fact, was a full and ample indemnity and consideration to McCallum for his outlay for the note. This fact being established, it is most clear that it would have been a great fraud and wrong upon the defendant to have enforced against him the collection of the note, when McCallum had already been fully reimbursed by the rescue of his estate from the valid incumbrance the defendant held upon it, and which passed to McCallum by the transfer of the note. We hold that in such a case the testimony was competent and was properly admitted. There is a well established exception to the rule that parol evidence is inadmissible to alter, vary or impair the legal effect of a written contract of endorsement such as this, which we fully recognize. As between the original parties to commercial paper, or others having no superior equities, parol evidence has always been admitted to show fraud, want or failure of consideration, or that the enforcement of the contract according to its legal effect as gathered alone from the writing would operate as a fraud upon the defendant. And we apprehend that nothing can be found in our own decisions that, upon careful scrutiny, conflicts with this well established exception, where a defendant has sought to bring himself within the exception. The rule is thus strongly stated in the text books: "Notwithstanding the general rule, that bills and notes cannot be contradicted in their legal effect by oral evidence, it is well settled that they may, between the original parties, be impeached for illegality, for failure of consideration, for fraud, for want of consideration, or by showing a subsequent agreement varying the original contract or waiving a portion of

it."—Edw. Bills, 141. While the legal effect of an endorsement may not, in general, be changed by parol proof, the rule does not exclude proof of fraud, or want, or failure of consideration.—Id. 295, 296, 297.

Parol evidence may undoubtedly be given of the circumstances under which a note or its endorsement is made, in order to show a want or failure of consideration, or illegality in the transaction, or to present the defence of a fraudulent appropriation of the note to a purpose to which it was not intended, or to establish a contemporaneous agreement as to the mode of payment which has been executed in satisfaction of the debt.—Chitty Bills, 69, 142; Duncan, Sherman & Co. v. Gilbert, 5 Dutcher, 521; Oliver v. Phelps, Spencer 180, 1 Zab. 597; Chaddock v. Vannep, 35 N. J. 517, 10 Am. Rep. 258. These rules apply as between the immediate parties or subsequent parties without superior equities. The language of the rule, says a late text writer, implies its limitation, for it does not extend to exclude evidence offered to show want or failure of consideration, or to impeach the original, or present validity of the endorsement on the ground of fraud. Facts may always be proven by parol that tend to show that the enforcement of defendant's liability would operate as a fraud.—1 Danl. Neg. Inst. §§ 220-722. A fine illustration of the exception is found in the case of Hill v. Ely, 5 Serg. & Rawl. 366, where the holder handed Hill the notes, saying: "Hill, you must endorse the notes." The defendant replied: "That is not our understanding." To which the plaintiff rejoined: "They are made payable to you, how will you convey them? You must endorse them, that I may collect them." The defendant then said: "I will endorse them, but remember that I am not to be responsible for their payment." The Court said the evidence went to prove a direct fraud in obtaining the endorsements or their perversion to a use never intended, a fraudulent purpose. And the testimony was held properly admitted. But aside from this question there are ample grounds upon which this verdict may be sustained, even if we concede the testimony of the defendant to have been improperly admitted, which we do not. When McCallum bought this note the mortgage of the defendant, Jobe, for its security was an unquestionable incumbrance upon the land, and the mortgage is conceded to have been an abundant security for its payment while the mortgage and maker of the note was known to all parties to be utterly insolvent. Now, whatever may have been the effect of Jobe's endorsement in imposing upon him a *prima facie* technical liability upon the note, it is manifest from the



testimony of McCallum himself, and from all the surrounding circumstances, that McCallum's paramount object in buying the note was to discharge the incumbrance and relieve his property. And we are equally well satisfied that Jobe, having full knowledge of the insolvency of the maker of the note, and having a full and perfect security in the mortgage for the payment of the whole amount of the note and interest, would not have disposed of it as he did for less than its value, losing several years of interest upon it, if he had intended that, in addition to his investing McCallum with all his interest in the mortgage, he was also to be held personally bound on the note. The facts of the whole negotiation are most unimpeachable witnesses for him, and they acquit him of this great folly, and his own testimony to that effect, in our judgment, unquestionably interprets the true intention of the parties in the transaction. We hold that there is enough in the case without his testimony to show that it cannot be possible that it was the intention of the parties that he should be bound for the payment of the note. It is developed in the proof that Jobe's remedy under the mortgage was temporarily embarrassed by an injunction bill then pending to restrain the collection of certain separate interest notes alleged to be usurious, and the true solution of his conduct is in the fact that this transaction with McCallum was the shortest and best way for his own extrication, without the greater sacrifice of a protracted delay in the foreclosure of his mortgage. What then is the legal effect of this transaction? It seems to us that the authorities are very clear to the effect that, by operation of law the debt was extinguished and that there can be no recovery on the note. In such a case the sale of the note carried the security with it, and no paper title was necessary to invest the purchaser with all the benefits of the mortgage.—*Cleveland v. Martin*, 2 Head. 131. It would certainly be a monstrous anomaly of wrong to permit McCallum to be first remembered for his whole outlay by a discharge of the incumbrance upon his land, and then to be paid the same amount again by compelling Jobe to pay the note, the former being doubly indemnified, and the latter losing his entire debt. The law scorns an alliance with injustice and oppression, and perhaps no case can be produced which so well illustrates the obvious justice and soundness of the principle that in such a transaction the debt is merged and extinguished by operation of law.

In support of this view we cite numerous authorities bearing upon it in divers aspects, and which we hold to be decisive of the

case.—1 Hil., Moot. 236, 237, 251, 375, 540, 543, 504; Perry on Trusts 318 351; 7 Hmph. 127; 5 Cow. 202; 4 B. Man 529; 34 Iowa 392; Meigs R. 52; 4 Johns. 43; 15 Mass. 485; 19 Johns. 325; 2 Wash. R. P. 500; 6 Allen 79; 2 Johns. Ch. 128; 10 Paige 255; 6 Yerg. 116; 8 Mass. 493; 22 Peck. 394; 2 Cold. 167; 9 Humph. 726; 20 Penn. 283; 14 Peck. 104; 3 Johns Ch. 53; 6 Johns Ch. 417; 1 Allen R. 242; 18 Ves. 384; 20 Mo. 482; 20 Mich. 9; 6 Peck. 492, 3 Cush. 554; 2 Barb. Ch. 618; 51 Ill. 331; 51 N. Y. 333; 10 Paige 595.

Affirm the judgment.

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## NATHAN M. COX v. JOSHUA KENT.

Jackson, March 10, 1877.

**PRACTICE—PETITION FOR CERTIORARI—SUFFICIENCY OF.**—Where a party, in his petition for a *certiorari*, simply states that he misunderstood the officer as to the time of the trial, without charging that the officer practiced any deception upon him as to time, or that he made his return different from the truth, such a petition is insufficient.

**CASE CITED.**—Copeland v. Cox, 5 Heiskell.—[Ed.]

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McFARLAND, J., DELIVERED THE OPINION OF THE COURT.

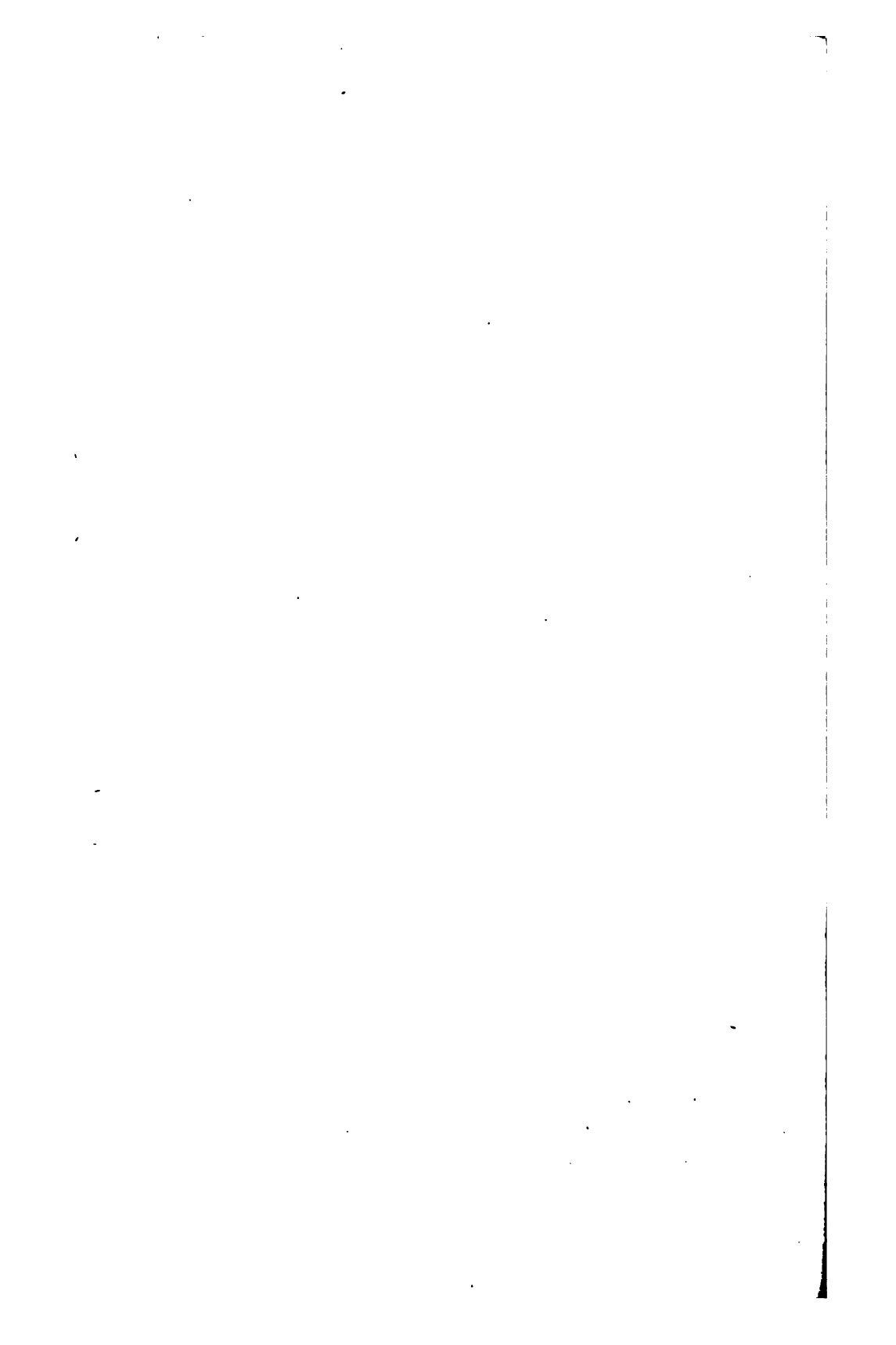
The only question in this case is whether the petition for the writ of *Certiorari* to bring up the cause from a Justice of the Peace, states sufficient reasons for not appealing. On this subject the petition says: "Petitioner told the officer at the time the warrant was served on him and his securities, that he had a good defence against a recovery on said note, and was going to defend the suit and resist the judgment. Whereupon the officer said that in case any defence was to be made he was instructed to return the warrant before Esquire Armstead. Your petitioner was then summoned to answer the complaint, and also his security. The trial was put off some time, and your petitioner thought Saturday the 26th of this month was the day of trial. He so understood the officer at the time, and never knew any better until yesterday, when he was informed that the warrant was returned before said Justice on Saturday the 19th of this month, at which time

judgment was rendered, and before your petitioner was apprised of said mistake the time allowed for him to appeal had expired. Petitioner told said officer that he intended to appeal to Court. He was advised by his counsel not to make his defence before the Justice, but to appeal to Court and make it there. That he intended to go to Granville, where the Justice lived, and appeal on the 28th of September, which would have been in time but for the mistake. That he lost his right to appeal by no fault or negligence of his; that he could not help the misunderstanding as to the time."

So long as the rule is maintained of requiring the petitioner to show a reason for not appealing, before allowing the *certiorari* as a substitute for appeal, the reason for not appealing ought to be substantial, and show that the petitioner has been guilty of no culpable negligence and want of attention on his part. It is not the policy of the law to relieve persons from the consequence of their own culpable negligence. It has been said that, as the jurisdiction of Justices increases the strictness of the rule in this regard should be relaxed, but still the rule cannot be abandoned altogether.

The petitioner does not state that the officer practiced any deception upon him as to the time, or that in fact that he made his return different from the truth, but simply that he misunderstood the officer as to the time of the trial. It is true mistakes often occur, but with the most ordinary care and attention to the matter the mistake could not have occurred.

Petitioner should have taken the care at the time to have known from the officer the day set for the trial. This he could easily have done. Parties must be held to ordinary care and attention to their business. A mistake of this sort could be easily manufactured. In *Copeland v. Cox*, 5 Heiskell, Judge Deaderick said: "Unless a party has been deprived of his right of appeal by inevitable accident, by the wrongful act of the Justice or adverse party, or his own blameless misfortune, no matter how meritorious his case may be, he must be repelled from Court." We are of opinion that the judgment of the Circuit Court Judge, dismissing the petition, is correct, and should be affirmed.



# General Legal Information.

CONDUCTED BY  
JAMES C. BRADFORD,  
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List of Journals from which Abstracts are taken:

NAME.	ABBREVIATION.	ADDRESS.	PUBLISHED.	PRICE.
Albany Law Journal	Alb. L. J.	Albany, N. Y.	Weekly.	15 cents.
American Law Record.	Am. L. Rec.	Philadelphia Pa.	Monthly,	50 cents.
Central Law Jourdal.	C. L. J.	St. Louis, Mo.	Weekly.	50 cents.
Chicago Legal News.	C. L. N.	Chicago, Ill.	Weekly.	10 cents.
Weekly Notes of Cases.	W. N. C.	Philadelphia, Pa.	Weekly.	20 cents.
Western Jurist.	West. Jur.	Des Moines, Ia.	Monthly.	50 cents.
The Law and Equity Reporter.	L. & E. R.	New York, N. Y.	Weekly.	25 cents.
Washington Law Reporter.	Wash. L. R.	Washington, D.C.	Weekly.	10 cents.

## BOOK NOTICES.

**TENNESSEE CHANCERY REPORTS.** Vol. 2. By Chancellor Wm. F. Cooper. St. Louis: Geo. I. Jones & Co.—We have before us the second volume of Chancellor Cooper's *Tennessee Chancery Reports*, recently issued by Geo. I. Jones & Co., St. Louis, Mo. The book comprises a number of cases, involving a variety of questions of equity jurisprudence and practice, decided by Chancellor Cooper at Nashville. These Reports are, as we understand, the only Reports embracing exclusively equity cases, being, at present, published in this country, and are therefore very valuable on this account. But the fact that the cases are decided by Chancellor Cooper is a sufficient guaranty of their excellence. He is the acknowledged leading authority in this country upon all questions of

equity jurisprudence, and any thing coming from him in the shape of a judicial opinion is entitled to the highest respect and consideration. The favor with which the first volume of these Reports was received by the foremost jurists of the country, and the frequent quotations therefrom by the text writers and judges of the highest Courts, confirmed his already well established authority as an equity judge. But the book speaks for itself. The cases are well selected, being upon novel and interesting questions of general importance, and they are reasoned out upon principle and authority. It seems to us that the real merit of the opinions consists in this: That the law of each case is not just simply stated without more, but the reasons and principles upon which it is founded are carefully and thoroughly

expounded. The Chancellor does not content himself with references to a few modern adjudications, and take for granted that what they decide is correct, but he goes back to the purest and most original sources of the law, and makes his own deductions and comes to his own conclusions. The result is, that his opinions are characterized by profound research and investigation, and a wealth of varied learning. The elegant and perspicuous style in which they are written adds much to their value, and is ample evidence of the varied culture and scholarly attainments of the author. We feel no hesitation, therefore, in commending these Reports to our professional brethren generally, and particularly to the members of the profession in Tennessee, as in the highest degree useful and valuable.

#### ABSTRACTS.

**BANKRUPTCY.** Judgment in Detinue for Plaintiff. The plaintiff in an action in detinue on judgment recovered by him and not paid is invested with the property in the chattel, and unless there is distinct proof that he elects to prove in bankruptcy, the assignee must deliver up the chattel. *In re Ware*, Ct. of Appeal (English).—[L. & E. R., Vol. 4, No. 14.]

**CONSTITUTIONAL LAW.** Estoppel Upon State to Deny the Constitutionality of a Statute. A previous adjudication by the Supreme Court of a State, that a statute of the State constituted a contract, does not estop the State from denying the constitutionality of the act. *Boyd v. State of Alabama*, Sup. Ct. U. S.—[L. & E. R., Vol. 4, No. 13.]

**CONTRACTS.** Voluntary Subscriptions. What Necessary to Enforce. A gratuitous subscription, to promote the objects for which a corporation is established, cannot be enforced unless

the promisee has, in reliance on the promise sued on, done some thing or incurred or assumed some liability or obligation, and it is not sufficient that others were led to subscribe by the subscription sought to be enforced. *Methodist Church v. Kendall*, Ex'r, Sup. Ct. of Mass.—[Ch. L. N., Oct. 6, 1877.]

**CORPORATIONS.** 1. **Fraudulent Transfer of Corporation Shares.** The owner of shares in a corporation, the certificates for which have been taken from her possession without her knowledge, and by means of a forged power of attorney in her name to the corporation, have been transferred through intermediate parties to a *bona fide* purchaser for value, to whom the corporation has issued new certificates, can maintain a bill in equity to compel the corporation to issue a certificate to her for her share and to pay her the dividends thereon.

2. **Bona Fide Purchaser.** A *bona fide* purchaser for value of corporation shares, transferred in fraud of the owner, can not be joined as a defendant in a suit in equity by the owner of the stock against the corporation, to compel it to issue a certificate to her for such shares, and to pay her the dividends thereon. *Pratt v. Taunton Copper Co.*, Sup. Ct. Mass.—[Cent. L. J., Vol. 5, No. 12.]

**Liability of Bank Directors to Stockholders for Frauds of Officers.** Bad faith, or gross negligence must be shown to hold bank directors liable to a stockholder for the dishonest actions of a bank officer. *Dunn v. Kyle*, Sup. Ct. Mass.—[L. & E. R., Vol. 4, No. 13.]

**DEED.** Covenant Running with Land. A covenant for compensation for injury to the surface from mining runs with the land. *Aspden v. Seddon*, English Ct of Appeal.—[L. & E. R., Vol. 4, No. 12.]

**Covenant of Seizin. When Breach Occurs.** The existence of a paramount title, whether asserted or not, is a breach of the covenant of seizin specifically expressed in the deed, as well as that contained in the words "grant, bargain and sale." *Cockrell v. Proctor*, Sup. Ct Mo.—[L. & E. R., Vol. 4, No. 14.

**EQUITY PLEADING. Account.** Necessary allegations to maintain a bill in equity for an account, the mere allegation of a complication of accounts is not sufficient; the facts must be clearly stated. *Badger v. McNamara*, Sup. Ct Mass.—[L. & E. R., Vol. 4, No. 13.

**LANDLORD AND TENANT. Injury to Stranger.** The owner of premises demised to a tenant is not liable for an injury sustained by a stranger owing to the premises being out of repair, unless he has contracted to do the repairs, or has let the premises in a ruined condition. In all other cases the tenant is *prima facie* liable. *Nelson v. The Liverpool Brewery Co.*, English High Ct, Common Pleas Div.—[Cent. L. J., Vol. 5, No. 14.

**MALICIOUS PROSECUTION. Facts to be Proved by Plaintiff.** In an action for malicious prosecution, to warrant a verdict for plaintiff, it must be proved: First, that the prosecution alleged in the declaration had been set on foot, and conducted to its termination, and that it ended in the final acquittal and discharge of the plaintiff. Second, that it was instigated or procured by the co-operation of the defendant. Third, that it was without probable cause. Fourth, that it was malicious. *Scott and Boyd v. Schelor*, Sup. Ct Va.—[L. & E. R., Vol. 4, No. 12.

**Malice and Want of Probable Cause must Concur.** Both malice and want of probable cause must concur and be

proved. Malice may be inferred from the want of probable cause, but the latter can never be inferred from malice.—*Ibid.*

**NEGOTIABLE PAPER. Promissory Note Secured by Mortgage.** A note payable five years after date, with a memorandum upon it that it is secured by mortgage on real estate, is not commercial or business paper. *Strong v. Jackson*, Sup. Ct Mass.—[L. & E. R., Vol. 4, No. 14.

**NUISANCE. How Established.** The question whether a nuisance exists or not can be established only by a regular proceeding in a court of common law jurisdiction. *Hutton v. City of Camden*, Sup. Ct of New Jersey.—[L. & E. R., Vol. 4, No. 12.

**RAILROAD. 1. Carriage of Baggage Free.** A railway company carrying baggage free is held to no greater diligence than any other gratuitous bailee.

**2. Carriage of Persons Free.** Public policy requires that common carriers should exercise the same extreme care in carrying persons free as in carrying them for hire. *Flint & Pere Marguette R. R. Co. v. Weir*, Sup. Ct. Mich.—[Cent. L. J., vol. 5, No. 13.

**RIPARIAN RIGHTS. 1. Rights of Owner of Shore of Navigable Body of Water.** The owner of lots abutting on a navigable stream or body of water has rights therein differing in kind and degree from the rights of the public, and has an action for damages for injury thereto, although the water's edge is the boundary of his title.

**2. Same.** As proprietor of the adjoining land, the owner has the right of exclusive access to and from the body of water at that particular place; and all the facilities which the location of his land, with reference to the body

of water, affords, he has the right to enjoy for purposes of gain or pleasure. *Delaplaine v. Chicago & Northwestern R. R. Co.*, Sup. Ct. Wis.—[Cent. L. J., vol. 5, No. 12.

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**TELEGRAPH. 1. Liability of Telegraph Companies for Negligence.** If an agent of a telegraph company is guilty of neglect in not ascertaining the identity of the sender of a valuable message, the company is liable to the persons injured.

**2. Liability of a Telegraph Company for the Fraud of its Agent.** If an agent fraudulently sends a forged dispatch, this is an act done in the course of his employment, and for which the company is liable. The rule is the same where the agent of company negligently permits a third person to commit the fraud. *Bank of California v. W. U. T. C.*, Sup. Ct. California.—Cent. L. J., vol. 5, No. 12.



THE  
Tennessee Legal Reporter.

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NEW SERIES.

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DECISIONS OF THE SUPREME COURT,

DIGESTED AND PUBLISHED BY

JERRE BAXTER.

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VOL. I. NASHVILLE, TENN., DECEMBER, 1877. No. 8.

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L. LEVERING *et al.* v. L. C. NORVELL *et al.*,

AND

M. B. BRADY & CO. v. L. C. NORVELL *et al.*

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Jackson, May 5, 1877.

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1. FRAUDULENT CONVEYANCE—VOLUNTARY CONVEYANCE OF PROPERTY IN FRAUD OF CREDITORS.—Norvell, Boone & Co., of Memphis, obtained credit from Brady & Co., in New Orleans, through one of their members (McKean), upon the faith of his individual estate, which he promised should remain in his own name, and be subject to his debts; but soon afterwards McKean made a voluntary conveyance of his property, when his firm was in doubtful circumstances, without warning Brady & Co., who continued the credit previously obtained.

*Held*, such a conveyance is evidence of fraud, in fact, and the registration of the deed does not alter the case. The property so conveyed will be liable to the satisfaction of debts due such creditor, though contracted subsequent to the conveyance. A debtor has no right to convey all of his tangible property and leave his creditors to take their chances of realizing their debts from assets,

consisting of bills and accounts payable, where the proof fails to show that such assets were available to creditors. As the deed is void for fraud, in fact, all the creditors will be allowed to share the proceeds.

CASES CITED.—White v. Bettis & Capps, MSS.; Martin v. Oliver, 9 Hum.; Churchill v. Well, 7 Cold., 364.

2. SAME—SAME—PAYMENT OF DEBTS—DOES NOT REBUT EVIDENCE OF FRAUD—WHEN.—Where a debtor makes a voluntary conveyance and afterwards pays a large part of his liabilities, this does not rebut the evidence of fraud.—[Ed.]

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M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

The firm of Norvell, Boone & Co. was composed of L. C. Norvell, O. C. Boone and Wm. McKean, and was engaged in the business of cotton factors and commission merchants at Memphis.

In the early part of the year 1860 they were largely indebted. These debts were principally drafts or bills drawn by them on other parties, and accepted in anticipation of cotton to be shipped by them, and consequently fluctuated in amount from time to time.

On the 30th of March, 1860, Wm. McKean, one of the partners, made a voluntary conveyance, for the benefit of his wife and children, of a number of separate pieces of real estate in and near Memphis, some slaves, and personal property.

The firm was dissolved in less than a year afterwards, leaving a large amount of indebtedness unprovided for. The present bills were filed to set aside the deed of Wm. McKean, and subject the property therein conveyed to the payment of the debts. The complainants in one of the bills are M. B. Brady & Co., who were merchants and factors at New Orleans. They claim a debt of from \$12,000 to \$14,000, with interest, a balance of a much larger debt. They were creditors of Norvell, Boone & Co. at the time the deed in question was made. The debts of the other parties, as well as those who came in by petition, were contracted afterwards.

The debts of Norvell, Boone & Co., on the 30th of March, 1860, the date of McKean's deed, amounted, according to the proof, to \$40,000, and it is very probable they were indebted in a much larger sum. The debt to Brady & Co. at that date was \$19,870.46, between which time and the 8th of June Brady & Co. paid and accepted further drafts from Norvell, Boone & Co. to the amount of over \$35,000. On the latter day a settlement was made between the parties, and after allowing to Norvell, Boone & Co. credits for a number of payments made subsequent to the 30th of March, 1860, they executed to Brady & Co. their note for the balance of \$30,717.73, with an agreement in writing, signed

by Brady, to correct any errors in the account. The claim of Brady is for a balance on this note.

The question is whether the deed of McKean for the use of his wife and children was in fraud of Brady & Co. It appears that McKean was considered the solvent man of his firm, on account, principally, of the real estate he owned in and about Memphis, worth at the time from \$60,000 to \$100,000. The property of the other members of the firm was not large. Brady, who was a brother-in-law of McKean, gave credit to the firm alone on the latter's account. The record contains a letter from McKean to Brady, dated the 16th February, 1860, which shows that it was in reply to a letter of the 8th from Brady to McKean, in which Brady had cautioned McKean against his partners, Norvell and Boone, expressing the opinion that they were wanting in integrity, and also warning McKean that his house was in danger. In reply McKean expresses his gratitude, not only for the warning, but also for the previous accommodation extended to his firm, admitting the recent acceptance by Brady & Co. of their drafts for \$23,000, which were then unpaid, which sums, however, he promises soon to meet by the shipment of cotton, but asks a renewal of a debt of \$10,500, which his firm had assumed to Brady & Co., on account of the individual debts of himself and Boone, which latter sum he said they could not then meet. He further says that since receiving Brady's letter, he had been looking closely into the business of his house, and found it in a very healthy condition, and that by the 1st of April they would be very easy. He further assures Brady that his property was all paid for, and in his own name, and *should remain so during his life*, and be responsible for his debts. After this, from the 29th of February, Brady & Co. accepted for Norvell, Boone & Co. to a very large amount, the greater part of which, however, Norvell, Boone & Co. afterwards paid or provided for.

It is argued on behalf of the defendants that nearly, if not quite the entire debt of Brady & Co., in existence at the date of the deed in question, was afterwards paid, and that all, or nearly all of the debt evidenced by the note of the 8th of June, was contracted after the date and registration of the conveyance, and with actual knowledge of its existence. It appears that in the account of Brady & Co., upon which the settlement of the 8th of June was made, there were charges for four bills or drafts drawn by Norvell, Boone & Co., and accepted by Brady & Co., two payable in October and two payable in November, 1860, all

amounting, with commissions for acceptance, to \$27,675.06. It is argued that if Norvell, Boone & Co. was indebted to Brady & Co. at all, it was only for these acceptances, that the balance of the account making up the note for \$30,717.13, was erroneous on account of commissions improperly charged, and other errors, and that the debt for these acceptances was at most but a subsequent debt contracted with notice in face of the deed in question. There is some uncertainty as to when these four bills were accepted by Brady. Boone testifies that they were accepted on the 8th of June, the day of the settlement, and made for Brady's accommodation, and to enable him to raise money upon them, but he fully disproves this in the subsequent part of his testimony.

It appears that Norvell, Boone & Co. purchased twenty-six slaves in South Carolina, and paid for them in part with two of the above acceptances of Brady & Co., amounting to \$18,000, and the balance with the acceptances of another firm, Richard Nugent & Co. They re-sold the slaves on the 14th of May, 1860. Boone proves that he thinks they had them on hand about two months. This would fix the date of the purchase of the slaves as early as the 14th of March, which was before the deed in question was made. At any rate, it appears, from the books of Norvell, Boone & Co., that two of the four acceptances referred to were used before the 3d of May in paying for the slaves. The other two drafts, from their numbers, appear to have been drawn before or at the same time, so it is clear that these drafts were accepted by Brady & Co. as early as the 3d of May, but whether before the 30th of March or not is not clear. But if they were accepted after the 30th of March we are of opinion that Brady & Co. accepted without actual knowledge, in fact, of the deed in question. It is true Shanks, who was the agent of Brady & Co., in Memphis, proves that he accidentally discovered the deed on the Register's books a few days after its execution, though he thinks not as early as the 5th of April. His best recollection is he notified Brady & Co. of it very promptly. Brady, who was the active member of his firm at New Orleans, thinks he first learned of it on his visit to Memphis, which was about the 8th of June.

The circumstances satisfy us that he did not, in fact, have knowledge of the deed when he made the four last acceptances above referred to. It fully appears that he was uneasy about the debt of Norvell, Boone & Co., he caused Shanks to urge upon said firm the settlement of the debt, and for the same purpose

sent up his bookkeeper about the 1st of April, and finally came himself about the 8th of June. Outside of these four acceptances his debt was then small, not exceeding \$3,000. It is not probable that he would, with a knowledge of the deed, then have increased the debt to the extent of \$27,000, with no security but the note of the firm, especially as he had previously trusted the firm alone upon the faith of McKean's individual property.

It is said, however, that the registration of the deed is conclusive notice that the creditors are presumed not to give credit upon the faith of the property conveyed by the deed. Such language is used in the case of *White v. Bettis & Capps, MSS.*, and *Martin v. Oliver*, 9 Hum.; but this, we think, does not apply in a case like this, where the creditor resided out of the State, had previously extended credit to the firm upon his faith in the property of the one member, and had been misled by the positive assurances so shortly before given by the latter that all his property was in his own name, and should so remain during life, and subject to his debts. *Churchill v. Well*, 7 Cold., 364. McKean knew that Brady had no faith in the solvency of Norvell, Boone & Co. as a firm, and trusted him alone; with this knowledge he gives him the positive assurances that his individual property is in his own name, and should so remain; and yet, within a very short time afterwards, he makes this deed conveying for the benefit of his wife and children all his individual property, real and personal, including eight different pieces of real estate, his slaves, horse, rockaway, drays, cows, household and kitchen furniture; in fact, all the individual property he owned, being the property on which Brady relied worth from \$60,000 to \$100,000, and this while a large portion of Brady's debts remain unpaid, and not only this, he allows Brady to continue his acceptances in behalf of his firm, without calling his attention to the sudden change of purpose on his part in relation to his own property, notwithstanding they were brothers-in-law, and on intimate terms. It appears that McKean did not inform Brady of his conveyance. It appears that at one time during the spring of 1860, though the precise date is not shown, McKean telegraphed to Brady, begging him to accept their drafts, or Norvell, Boone & Co. would fail, and that Brady did so, and it is admitted but for these acceptances the firm would then have failed. What drafts these were does not appear.

Under these circumstances we hold that McKean's voluntary conveyance is evidence of fraud, in fact, and that the registration of the deed does not alter the case. Brady relied upon

McKean's word as to his purpose not to convey his property.

We are satisfied that McKean had himself become alarmed in regard to his firm, probably, in fact, on account of the warning of Brady, and he made this conveyance with a view to save his individual property in the event the firm failed.

It is not insisted that McKean retained, at the time of making this deed, any individual property, unless it be some swamp or wild lands in Mississippi. The answer admits that the deed conveyed all or nearly all of his real estate. The grants for these Mississippi lands are afterwards found and filed as evidence, but there is no satisfactory proof that McKean still remained the owner thereof, but it is earnestly argued that the firm of Norvell, Boone & Co. was solvent, and had ample assets to pay its debts. The nominal value of the assets was about \$90,000, consisting, principally in bills and accounts payable, but we think the proof does not show that these assets were available to creditors. It does not appear that any considerable amount was afterwards realized, the payments subsequently made on the debts were made principally by creating new debts. Assets of this character on paper are very delusive. They are not available to creditors. A debtor has no right to make a voluntary conveyance of all his tangible property, and leave his creditors to take their chances of realizing their debts from assets of this character.

The twenty-six slaves, if on hand at the date of the conveyance, are not to be regarded as assets, for they were paid for with the acceptances of Brady & Co., and others not included in the estimate of the indebtedness of the firm.

The fact that a large part of these debts were subsequently paid, does not rebut the evidence of the fraud. Of course, where a debtor, subsequent to his voluntary deed, pays all his debts, this rebuts the evidence of a fraudulent purpose, alone from the voluntary conveyance. We have no doubt that McKean intended to allow all the resources of his firm to go in payment of the debts, if they were thus satisfied it was all well, but if not his purpose was to save his individual estate from the creditors. The payments made to Brady after the 8th of June, as well as some payments made to other parties, were made by Norvell, Boone & Co. shipping goods to them to be sold or credited on the debts. These goods were bought in the summer and fall of 1866, in the Northern and Eastern cities, and the debts created by these purchases are the debts claimed by the complainants in the first-named case of Levering & Co., and others who come in by petition. As we hold the deed void as to Brady & Co. for fraud

in fact, all the creditors will be allowed to share the proceeds.

The decree of the Chancellor will be reversed, the deed in question declared void as to the creditors, and the cause referred to the Clerk for an account of the debts.

L. B. HARRIGAN *in error* v. FIRST NATIONAL BANK AND  
W. W. THACHER.

Jackson, May 19, 1877.

*Reported in 9  
Bay. 137.*

1. FRAUD AND DECEIT—PARTY MAKING REPRESENTATIONS THAT AFTERWARDS BECOME FALSE—NOT LIABLE—WHEN.—Harrigan applied to Thacher, the cashier of a bank, for information concerning the solvency of Toof, Phillips & Co.; Thacher replied favorably as to their credit, and upon this assurance plaintiff, from time to time, purchased large amounts of the bills and acceptances of said firm. Eight months later, Toof, Phillips & Co. failed, and plaintiff lost \$2,000 by his investments, thereupon he brought suit against Thacher and the bank for deceit.

*Held*, an honest statement of a mere opinion, however erroneous as to the solvency or reliability of another, can not furnish the grounds for an action of this character. A party can not be held, in such a case, to have given a continuing guaranty against future contingencies, nor to have bound himself to notify the other of what he may well be assumed to be able to discover for himself.

CASES CITED.—1 Metc., p. 6; 13 Vesey 133; Wynne & Co. v. Allen, 1 Bay 312

2. PRINCIPAL AND AGENT—BANK NOT LIABLE FOR ACTS OF CASHIER—WHEN.—Answering questions as to the solvency of parties, is no part of the business of a cashier of a bank, nor fairly included within the scope of such business. It may be, and probably is, an incident of such position, but not an incident to it.

*Held*, no liability attaches to the bank in such case.

CASES CITED.—Barwick v. English Joint Stock Company, see 2 Law Reports, 265; Swift v. Jewsbury, Law Reports, 1874, p. 314.

3. BILLS AND NOTES—GUARANTOR RELEASED BY CONDUCT OF HOLDER—WHEN.—When the holder of paper has given credit to a third party upon the recommendation of a cashier of a bank, and the debtor is ready and offers to pay the note at maturity, and the holder instructs the cashier to give the debtor an extension of time, which the debtor accepts, and then fails, the cashier, though he had rendered himself liable by his recommendation, is discharged by the release of the holder.—[Ed.]

FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

This is an action by Harrigan against the Bank and W. W. Thacher, individually, for deceit. Thacher was the cashier of the bank, and plaintiff applied to him in 1872 for information as to the solvency of the firm of Toof, Phillips & Co., a business house in the city of Memphis.

It is averred in the declaration that Thacher replied, assuring plaintiff that he was well advised and informed as to the condition of said firm, and on being informed that plaintiff proposed purchasing acceptances and bills of exchange on said firm if assured of their solvency, Thacher told him the firm was solvent and in prosperous business and financial condition, and that such purchases would be, in the judgment of defendant, a prudent and safe investment. The gravamen of the declaration is that plaintiff, relying on these assurances, from time to time purchased a large amount of bills and acceptances of said firm, amounting in all to \$15,000, and that the statements made by defendant were not true, and known to be so, and that such investments were imprudent and risky, said house being known by defendants to be involved, and said representations were false, fraudulent and deceitful.

It is alleged that by reason of said representations, plaintiff had thus been induced to buy, and had suffered a loss of an unpaid balance on his purchases to the amount of \$2,000.

We need not at present go into the testimony in the case, as it is clear no reversal can be had for want of evidence to sustain the verdict, if the law was correctly given to the jury by the Court below.

It is insisted, however, very earnestly, that this was not done, and we proceed to examine the questions presented in argument in this view of the case, and determine whether such errors exist.

The leading principles on which this action is sustainable are few and simple. The gist of the action is fraud and deceit in the party making the representations, and damage to the plaintiff by reason of such fraud and deceit in the representations made. 1 Metcf., p. 6. As said in 13 Vesey, 133, cited in the above case, "the proposition is not that if a man being asked whether a third person may be trusted," answers "you may trust him, he is a very honest man, and worthy of trust," an action lies if he proves otherwise. There must be knowledge at the time. That is the sound principle, that the defendant, knowing that person to be dishonest, insolvent and unworthy of trust, made the representation." The like principle is more fully stated by Judge Deaderick, after a very full review of the authorities in the case of Wynne & Co. v. Allen, MSS. He says: "The result is that if a party represents as true that which he knows to be false, in such a way and under such circumstances as to induce a reasonable man to believe that it is true, and it is meant



to be acted on, and the person to whom the representation has been made, believing it to be true, acts upon the faith of it, and by so acting sustains damages, such representation is fraudulent, and will sustain an action by the party damaged."

While these cases hold, the party must know his representation to be false in order to make himself liable, and such is the general rule, there might be a case where a party would be liable for stating as true, with a view and purpose to influence another party to trust a third party, that which he did not know. The purpose to influence the action of the party, however, by such statement as to facts by which that other party was injured, regardless of their truth, would be the essence of the liability in such a case. We need but say that an honest statement of a mere opinion, however erroneous as to the solvency or reliability of another, could not furnish the grounds of an action of this character.

We have carefully examined the charge of the Circuit Judge in this case, and think it, in its essential features, is not only a correct statement of the principles of law applicable to the main facts of the case as against Thacher, but that it is even very favorable to the plaintiff, more so, probably, in some respects, than was strictly accurate. For instance, he goes in one part of his charge on the idea, and so tells the jury, that if Thacher knew plaintiff was buying Toof, Phillips & Co's paper on the faith of the representations made by him, and their circumstances had changed so that, as he says, "these representations had become false," it was Thacher's duty to have notified plaintiff, and put him on his guard, otherwise he would be liable. While this is sound morally, and under some circumstances, might be sound law where the party trusting to the representations lived at a different point, and might be assumed to rely entirely on the statements of his correspondent, yet it is very questionable whether the principle could be fairly applied to the case of parties all residing in the same town or city where the party buying paper might be expected, as a man engaged in such business, to look after his own interest, and had equal means of information or opportunities to acquire knowledge with any one else as to the changes in the situation of his debtor.

It could not fairly be assumed that when the cashier of a bank is applied to for information as to the solvency of a party, and gives that information truly, that he thereby undertakes to watch over the interest of such party in the future, assumes a sort of guardianship over it, and is expected to be responsible if he fails

to give notice of change of circumstances, or reverses in trade, that may befall the party about whom he has given information. The more natural and sounder view of the question would be, that if any future information was wanted, he would again be applied to under such circumstances, and if no application was made, he might well assume that the party whose interest was at stake like other business men, was able to take care of himself, and was guarding his investment with the watchfulness of one most concerned in the result. A party can not be held, in such a case, to have given a continuing guaranty against future contingencies, nor to have bound himself to notify the other of what he may well be assumed to be able to find out for himself. We do not deem it necessary to elaborately explain our approval of the correctness of the charge of the Court below. It suffices, as we have said, that it is most favorable to the plaintiff, and if erroneous, it is in this aspect alone, of which plaintiff can not complain.

We do not think the Bank, in any aspect of this case, could be held responsible for the representations made by its cashier. There may be cases where such liability might be incurred by the corporation by reason of representations made by the agent, such as the president or cashier. It must, however, be on the principle stated by the Court of Exchequer, in the case of *Barwick v. English Joint Stock Company*, that the principal has placed the agent in his place to do that class of acts, and he is held to answer for the manner in which such agent has conducted himself in doing the business which it was the act of the principal to place him in. See 2, Law Reports, 265.

Answering questions as to the solvency of parties is no part of the business of the cashier of a bank, nor fairly included within the scope of such business. It may be, and probably is, an incident of such a position, but not an incident to it. The bank was not applied to for information in this case, but Thacher. He was applied to no doubt because of his supposed knowledge of the business of such houses, growing out of his position, or acquired by reason of his position. But his information would have been as full, as said by the Court of Queen's Bench, in the case of *Swift v. Jewsbury*, Law Reports, 1874, p. 314, had he been turned out of his office twenty-four hours before he was applied to, and worth as much as ex-cashier as while he was cashier. It was his information that was wanted, his opinion that was sought, not that of the bank. It was his opinion that was given and acted on at first, and not the opinion of the bank, and in no

sound principle can the bank be held responsible for such an opinion under the circumstances of this case. We have carefully examined the cases cited by plaintiff supposed to favor the liability of the bank, but do not think they sustain his view, and if they did we would not feel bound to follow them, or hold them applicable to the case before us.

There is, however, a ground that we think would be conclusive against plaintiff in this case. It clearly appears that on the day the paper fell due on which the loss was sustained, plaintiff was in Jackson, Tennessee. The house of Toof, Phillips & Co. had made arrangements to meet it, but desiring an extension of time on it, they telegraphed to plaintiff, and he replied to the cashier, Thacher, to suspend collection until he (Horrigan) should get back to the city. When one of the partners went to the bank to pay the bill, he found this telegram in the hands of Thacher, accepted the offer of an extension as a matter of course, did not pay, but used the money in other business. Had not Horrigan given the extension of time, there would have been no loss. He can not complain of the result of his own voluntary act.

We see no evidence whatever of complicity on the part of Thacher with Toof, Phillips & Co., in seeking this extension; on the contrary, the proof shows it was asked for by the house, without consultation with Thacher, and without his knowledge. We are totally unable to perceive the force of the argument, that it was Thacher's business to notify Horrigan that the firm was then pressed, and advise him not to give the extension. He was not the guardian of the interest of Horrigan, and certainly owed no such duty by reason of having told him of the situation of the firm eight months before, when called on for the information. We do not think it necessary to examine in detail the requests to charge numerous propositions made by plaintiff. The law, as charged, presented the real case before the Court fairly and fully and the principles governing it.

We are well satisfied that the case should be affirmed on the facts, and that the law has been administered certainly most favorably to plaintiff's case.

Affirm the judgment.

## CHESTER v. CANFIELD &amp; HULL.

Jackson, June 9, 1877.

1. MISREPRESENTATIONS—GROUND FOR RELIEF IN EQUITY—WHEN.—Whether a party misrepresenting a fact, knows it to be false, or made an assertion without knowing it to be true, on which another relies, is immaterial in a Court of Equity. It equally operates a surprise and imposition on the other party, and is ground for relief:

CASES CITED.—Heisk. Dig. p. 376, and cases cited.

2. PLEADING—ANSWER, THOUGH THE OATH IS NOT WAIVED, MUST STAND AS AN UNSWORN ANSWER—WHEN.—A party's answer, though the oath be not waived, must stand as an unsworn answer when it is not certified to, so as to make the affidavit effective, the prothonotary not showing that he was a Clerk of the Court in which the Justice of the Peace presided, as required by the Code, § 4389, so that the answer but makes an issue.

3. FRAUD—CONSPIRACY—STATEMENT OF FACTS.—Canfield & Hull were acquainted—had been together some two weeks—they went together to Chester, when the negotiation commenced. Hull sat by during the trade and heard all that was said, and remarked that the lots were probably worth the money. He claims to have had no interest in the matter. He seems to have known that the trade was to be made, and to have arranged for his share of the land, transferred to him by Canfield; the deed was directed to be made to him.

Held, that it appears, from a fair preponderance of the proof, that Hull was a party to the misrepresentation and fraud of Canfield; that he took the benefit of the same under circumstances of suspicion, that causes him to stand or fall with his confederate.—[Ed.]

FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

This bill is filed by Chester to rescind a contract by which Chester conveyed 4,000 acres of land to defendants—that is, 2,000 to each—in consideration of a small tract of 150 acres in McNairy County, Tennessee, and three lots in Cook County, Illinois, in what was known, or represented to be, as Frisbie's Addition to South Chicago, Town of Hyde Park, numbered as lots 32, 33 and 34, fronting 25 feet on Sheridan street, running back 125 feet.

The trade was made with Canfield in the city of Jackson, Tennessee, on the 7th of September, 1870, he being the sole owner of the property, his co-defendant, Hull, being charged as present and participating in the transaction, and equal participant in the fraud, as is evidently believed by complainant. The trade, however, is shown to have been made entirely with Canfield, it having been commenced on the evening of the 6th, and completed next day; after the parties had agreed on the terms of their trade, Canfield represented he had sold one-half the land to Hull, and requested that a deed to one-half of it be made direct to him, to save trouble and expense of two conveyances, which was done.

The grounds of relief set up in the bill are fraudulent misrepresentations, first, as to the land in McNairy County—that is, that it lay within three miles of the Mobile & Ohio Railroad, and was worth \$15 per acre, whereas, in fact, it is charged to have been not worth more than three or four dollars per acre, and was situated seven miles from the railroad. We may put this out of the case, as it probably was the folly of complainant to trust to the statements of an entire stranger in a matter which he could have informed himself of in a few hours at most, by a short ride by rail to the neighborhood.

As to the Chicago lots, however, the case is different; they were in a distant State, and, it is alleged, Canfield represented these lots to be located within three miles of the business portion of Chicago, and within easy access of said city, that he had been offered \$2,000 each for them; in fact, it is charged, the lots are more than ten miles from the city in a swamp or marsh, and utterly worthless.

The proof shows that Canfield told Chester he had never seen the lots, but had seen the McNairy land, and this is probably the fact. We need not go at any length into the question between complainant and Canfield. It suffices to say, his representations are proven as strongly as charged, with reference to the lots, and are as certainly proven to be false in every particular. The lots are about eleven miles from the city, are in a marsh, subject to overflow, the streets are only on a map, and Chicago extended in this direction is a myth, the lots having probably no market value, estimated by real estate men knowing them as worth twenty-five or thirty dollars each, nominally. So far as Canfield is concerned, there is no difficulty in the case. The representations were grossly false, were recklessly made, and confided in by Chester.

Whether a party misrepresenting a fact, knew it to be false, or made an assertion without knowing it to be true, on which another relies, is immaterial in a Court of Equity. It equally operates as a surprise and imposition on the other party, and is ground for relief.—See Heisk. Dig., p. 376, and cases cited. As to defendant, Hull, the case presents more of difficulty. He and Canfield both swear in their depositions that Hull had nothing to do with the trade, and bought alone from Canfield. Hull's answer, though the oath is not waived, must stand only as an unsworn answer, as it is not certified to so as to make the affidavit effective, the prothonotary not certifying or showing he was a clerk of the Court in which the Justice of the Peace pre-

sided, as required by the Code, section 4389, so that the answer but makes an issue. Canfield's deposition can not go for any thing, as his gross and wanton misrepresentations, made regardless of truth, show him unworthy of credit.

The case must stand on the other proof in the record. It shows that Canfield and Hull were acquainted before; had been probably together some two weeks; that they went together to Chester the evening of the 6th, when the negotiation commenced; that they went back to meet Chester the next morning together. Hull sat by during the trade and heard all that was said, and is proven by Chester to have said the lots were probably worth the money, or the trade was a good one. He claims to have had no interest whatever in the matter, but he seems to have had an understanding that night, or before going to Chester's office with Canfield, that the trade was to be made, and to have arranged for his share of the land. This was all agreed on before the terms of the trade had been agreed on, so that as soon as it was completed, the deed was directed to be made to him. It is hardly conceivable that he should not have conferred fully with Canfield on the subject of the trade, and known all his plans; in fact, all the circumstances indicate a plan on the part of a couple of sharpers to take an advantage and make a speculation out of a too confiding owner of lands—lands shown to have been worth at least \$6,000, while the lands given for them are not worth \$500, if that.

In addition to this view, there are contradictions between Canfield and Hull in their statements as to the consideration paid for the 2,000 acres conveyed to Hull. Hull swears he paid at the time of making the deed \$1,760; soon after, at Cincinnati, \$140 more, also an interest in a patent seed drill, and other sums, he says, at different times; and in addition, paid for the stamps on the deed, amounting to \$30 or \$40. Canfield says he received \$1,542 for the land, the greater portion paid at the time. It is, however, shown that both of them represented they had but little money, and Chester was compelled to pay for registration of the deeds on this plea. In Hull's answer, however, he states the consideration the same as that given by Canfield. There are other contradictions that might be pointed out, but these suffice.

We conclude, that it appears, from a fair preponderance of the proof, that Hull was party to the misrepresentation and fraud of Canfield; that he took the benefit of the same under circumstances of suspicion that compel us to the conclusion that he

must stand or fall with his confederate. The Chancellor so held, and we affirm his decree, except we direct title to be divested by decree instead of reconveyances, and that Canfield pay the costs of this and the Court below, inasmuch as the land in McNairy County will satisfy the costs, and is within reach of an execution.

Let the decree be affirmed with these modifications.

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GEO. J. CLEMENT *et al.* v. STATE, *for use of* J. F. SCOTT.

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Nashville, March 2, 1877.

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CLIENT AND ATTORNEY—WHEN CLIENT MAY DISMISS SUIT, WITHOUT ATTORNEY'S CONSENT.—The suit was brought upon an apprentice bond for the use of Scott. Afterwards the parties signed a writing directing the suit to be dismissed. Scott's lawyers interposed, and the Court declined to dismiss.

*Held*, a party has a right to dismiss a suit of this character, to compromise and arrange his own rights, and no agent or attorney of his, he being *sui juris*, can control his action in such a matter, the attorneys having no lien except on recovery, not before. No fund was empounded.—[Ed.]

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FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

This was a suit brought by Scott in the name of the State, on an apprentice bond. Several questions have been argued before us, but we need only notice one, which is conclusive of the case.

After the suit had been pending some time, the parties compromised the case, and Scott signed a writing directing the suit to be dismissed. His lawyers, however, interposed, and the Court declined to dismiss. The case progressed, when another paper was signed and sent to the Clerk, peremptorily directing the suit to be dismissed.

The attorneys again seem to have interposed, and the Court refused to dismiss the suit. In this he clearly erred. A party certainly has the right to dismiss a suit of this character, to compromise and arrange his own rights, and no agent or attorney of his, he being *sui juris*, can control his action in such a matter. It is good public policy, that parties shall settle their differences without the expense and vexation of litigation, if it can be done.

and such settlements should be encouraged rather than discouraged by the Courts.

The attorneys and Court, we suppose, went on the idea of a lien on the part of the attorneys for their fees, in case of recovery. But the lien, in a case like this, could only exist on the recovery, not before. The parties lived in the State—no fund had been impounded by the attorneys, and held under the orders of the Court—in fact, nothing to give the attorneys the right claimed. The plaintiff was examined on the trial, and shows the agreement was fairly entered into, and seemed perfectly satisfied with it. Even if it had not been fairly entered into, so far as he was concerned, he alone had the right to disaffirm his own act. His attorneys could not interpose to do it for him.

Without further discussion, let the case be reversed, and this Court will enter the judgment which the Court below should have entered, dismissing the case. The defendants below, however, will pay the costs of that Court up to the time of the trial, as that was the agreement. Costs of this Court follow the judgment of reversal.

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R. J. BLACKWELL v. WM. H. FITZPATRICK, *Adm'r.*

Jackson, May 26, 1877.

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EVIDENCE—PLEADING—ASSIGNMENT OF NOTE—PROOF OF NECESSARY—WHEN.—Where a party sues upon a note that has been assigned to him, it is necessary that he should prove the assignment, if contested, in order to establish his claim to the paper sued on; yet such assignee will not be required to prove the assignment, unless it be denied by plea. If the suit originates in the Circuit Court, the plea should be written; if it originates before a Justice of the Peace, the plea may be oral, either before him or on appeal to the Circuit Court.

CASES CITED.—Richardson & Price v. Cato, 9 Hum., 460; Stone v. Bond, 2 Heisk., 425.—[ED.]

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DEADERICK, C. J., DELIVERED THE OPINION OF THE COURT.

Fitzpatrick, as administrator, obtained a judgment against Blackwell before a Justice of the Peace of Lauderdale County, upon a note assigned to his intestate.

Blackwell appealed to the Circuit Court, the note upon the trial was read, to which defendant objected. The bill of excep-



tions shows that all the evidence in the cause was the note sued upon, and the assignment thereof by the payee to plaintiff's intestate. The Circuit Judge, a jury being waived, rendered judgment in favor of plaintiff, and defendant appealed.

The error assigned is, in allowing the assignment of the note to be read before any evidence of the assignment was introduced.

In the case of *Richardson & Price v. Cato*, 9 Hump., 460, it was held in a case originating before a Justice of the Peace to be error in the Circuit Judge to overrule an objection taken on the trial to the reading of the assignment of the note sued on, the objection being, as stated at the time, *upon the ground that such assignment was not proved*, the Court holding that the objection taken was equivalent to an oral plea, which was sufficient in a case coming up from a Justice of the Peace by appeal.

To the same effect is the later case of *Stone v. Bond*, 2 Heisk., 425.

But in both these cases, it will be observed that the facts relied upon, and stated in the objection to the reading of the assignment, was that the assignment was not proved, and it is this oral statement of the ground of the objection, which was regarded in the one case as equivalent to the plea of non-assignment, and in the other as a defence which might be made orally on the trial, no written pleadings, as a general rule, being required in cases coming by appeal from a Justice of the Peace.

The objection, without specifying the grounds of it, can not be considered a plea. A plea by a defendant in an action is a statement of facts constituting the grounds of his defence.

The objection taken in this case was to the reading of the *note* without any specification of the grounds of the objection or statement of facts, upon which the objection rested or was based.

If the ground of the objection had been specified, the oral plea thus interposed might have been answered by appropriate evidence. And while it is necessary that plaintiff should prove the assignment, if contested, in order to establish his claim to the paper sued on, yet the assignee will not be required to prove the assignment unless it is denied by plea. If the suit originates in the Circuit Court, the plea should be written; if it originates before a Justice of the Peace, the plea may be oral, either before him or on an appeal to the Circuit Court.

Let the judgment be affirmed.

WM. C. KYLE v. MARY, ROBERT KYLE *et als.*

Knoxville, September 29, 1877.

ADMINISTRATOR—JUDGMENTS AGAINST—BUT PRIMA FACIE EVIDENCE OF THE ESTATE'S LIABILITY—IN SUITS AGAINST THE HEIR TO SATISFY ANCESTOR'S DEBTS—ADMINISTRATOR PERSONALLY LIABLE—WHEN.—Judgments against administrators are, at most, but *prima facie* evidence of debts against the estate, which the heir is entitled to contest, and show to be incorrect, in proceedings to subject his land, to the payment of his ancestor's debt, as provided for by Section 2267 of the Code. A judgment confessed contrary to the truth of the case, as understood by the administrator at the time, will only effect him, but can have no weight whatever against the heir.

CASES CITED.—6 Yerg., 53, 66 and 68; 1 Yerg., 287, 288; Code, Sections 2267-9, 2258-9, 2262; Act of 1827 and 1784; 2 Yerg., 65; M. & Y., 358, 360.—[Ed.]

FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

The original bill in this case was filed February 2, 1870, by W. C. Kyle, as a creditor of the estate of Robert P. Kyle, deceased, and is simply a proceeding to subject the lands of the estate to the payment of the debt of complainant, under the Act of 1827.—Code, Sec. 2,267. That Section is: "Where an executor, not authorized by will to sell and convey real estate, or an administrator, has exhausted the personal estate of the deceased in the payment of his debts, leaving just debts or demands against him unpaid, or paid by the representative out of his own means, and the deceased died seized of real estate, the Chancery or Circuit Court where the same or any portion of it lies, may, on the petition of the representative, or any *bona fide* creditor, whose debt remains unpaid, decree the sale of such lands, or of such portion thereof as may prove least injurious to the heirs and legal representatives, and as may be sufficient to satisfy the debts or demands *set forth in the bill*, or petition, and shown to exist." By the next Section is provided, that before decreeing such sale, it must be shown that the personal estate has been exhausted in the payment of *bona fide* debts, and that the debts or demands for which the sale is sought, are justly due, and owing either to creditors or the personal representative, for advances out of his own means, properly made. By Section 2,269: "Such suits prosecuted under this Act, are to be conducted as other suits in equity," that is, as other suits of like kind, or suits to subject assets of an estate, are conducted by the established practice of said Court. This provision, together with the construction given them by the Courts, commencing with the leading case of Dulles v. Read, 6th Yerg., 53—decided in 1834—presents a simple and efficient mode of proceeding to attain the end designated, to-wit,

the appropriation of the real estate descended to the heir to the satisfaction of debts due, after the personal estate, the primary fund for this purpose, had been exhausted. It would certainly be an improvement on the system, however, if the whole estate could at once be brought under the control of a competent Court, the creditors all brought speedily before it, an account had of the assets, both real and personal, the latter collected under the direction of the Court, and a sale of the realty ordered as soon as the necessity for it shown, without the delay incident to the exhaustion of the personalty in actual payment of the debts by the administrator. These assets usually consist mainly of notes given for personal property sold by the administrator, which can only be collected after considerable lapse of time, frequently as long as the two years and six months, the period fixed by our law in which suit may be brought against him. This state of things gives rise to much complication, and presents frequently much of difficulty, with vexation and expensive litigation, that might be avoided under a different system.

But passing from this, we must take the law as we find it, and administer the rights of parties as fixed by it. This is a direct proceeding by appeal from the decree of the Chancellor ordering a sale of the land of the heir of Robert Kyle, deceased, and the only question before us is, whether, under the pleadings and facts shown in the record, this decree was a proper one.

The language of the Code, which we have cited, as well as the known purpose of the Act of 1827, as given in the case cited, shows clearly that the object of the proceeding was to settle up, and complete the administration of the estate, when a sale of the realty became necessary, in one suit. To use the language of Judge Green, 6th Yer., p. 66, the Act of 1827 intended that the Chancellor, having an account of all the debts before him, and an exact knowledge of the character, description and probable value of the estate, should take the lands into the custody of the Court, and direct its sale for the benefit of all, under such circumstances as would insure the best price. After adverting to the evils intended to be remedied, one of which was the accumulation of costs by separate suits on the part of creditors, he says: "If this view be just, would not the Legislature have been guilty of great folly if it had been intended by this act that more than one bill should be filed by the administrator," and then adds, that the creditor may file his bill, where the administrator fails to do so, for the attainment of the identical same ends which would have been attained had the administrator filed the bill.

Properly, the debts remaining due, especially when the bill is filed by the administrator, should all be set out in the bill, and, as far as they are known, the same should be done when the bill is filed by a creditor. The Court may, and in a proper case ought to enjoin creditors from bringing suit against the estate, as was held in the above case. The creditor who files the bill, as a matter of course, must specify his own debts, and can only ask a sale for the debts there set out in his bill. If a debt should be omitted by oversight or mistake at the time, or should afterwards accrue to the party, these should be added by amendment or supplemental bill. When the order is made for an account of debts, notice should be given to all creditors to come in and file their claims, which regularly ought to be by a petition, stating the nature and character of the claim. In cases of small sums, such creditor might probably appear before the master and file his claim, with its evidence in each case by affidavit, and if contested by the administrator or any creditor, make proof of the same, so as to meet the objection made to its allowance. This is certainly the proper practice in like cases in a Court of Equity, after the manner of which the case is required to be conducted.

Without going further into a statement of these general principles, we but proceed to apply such of them as are proper to this case.

The only debt mentioned, or claimed as due complainant in his bill, is the judgment obtained against White, administrator of Robert Kyle, June, 1868, for \$2,399.67. In fact, as far as we can see, it is probable he is the only creditor who has ever actively participated in this proceeding. A few other claims appear in the record; by whom, and when or how presented does not clearly appear. So far as all these claims on the part of others are concerned, which have been disallowed, they are not before us, as no creditor has appealed except complainant. So far as any may have been allowed over the exception of defendant, they may be considered, on the appeal of defendant. The claim of complainant is stated substantially as follows in the bill: "That, as one of the creditors of the estate, he recovered a judgment in the Circuit Court of Hawkins County in June, 1868, for \$1,399.67, with costs. While the general statement is made that the estate had been involved in disastrous litigation, and the personalty exhausted, leaving considerable just indebtedness unsatisfied," yet the above debt is the only one specifically mentioned as due and unpaid.

We proceed to an examination of this claim, as it stands in the

record, that we may see whether it is shown to be a *bona fide* debt, or, in the language of the statute, "justly due and owing," so as to be the basis for a decree to sell the land sought to be sold in this case. The first question is, what is the force and effect of a judgment against the administrator? Under the Act of 1784, carried into the Code, Section 2,258, and subsequent Sections, it is settled by a series of decisions unbroken, that the judgment against the administrator was not conclusive lien on a proceeding by *scire facias* to subject lands descended to the payment of debts of the ancestor, notwithstanding the *plea* of "fully administered," or no assets, had been found in his favor, as provided for in Section 2d of the Act.—Code, 2,259–2,262; 1st Yer., 287–288, and authorities cited. See also notes to T. and S. Code, and cases cited, § 2,258. The heirs had the right to contest the original demand with the creditor of the ancestor to the full extent the administrator had, when first sued.—1 Yer., 288; 2d Swan, 168. The plea of fully administered found in favor of the administrator, is only *prima facie* evidence of the right to the remedy given by *scire facias*, under the act of 1784. 1st Yer., 289. And if the administrator have a finding against him, or he permit it, or when the plea fully administered, or no assets is found against him, when really he had no assets, and afterwards proves insolvent, there is no legal liability on the part of the heirs and their lands that could be reached either in law or equity.—1st Yer., 289; Peck v. Wheaton's heirs, Martin & Yer., 354 to 360.

The remedy is against the administrator and his sureties, or against him personally.—Martin & Yer.—2 Ibid.

This being settled, the question is, does the Act of 1827 in any way alter these principles. No such purpose is found in the Act; on the contrary its language is clearly in accord with the previous policy of the law, to exempt the realty from sale as long as personalty remained, which might by any means be appropriated to payment of debts. The personalty must be shown to have been exhausted in doing this before the sale can take place by the words of the statute. That this policy was intended to be preserved, in the construction given to the Act, in the case of Dulles v. Read, 6 Yer., 68, and of the correctness of this view, we can have no doubt. This being so, the judgment against the administrator can be, at most, but *prima facie* evidence of the debt against the estate, which the heir is entitled to contest, and show to be incorrect, in this new and independent proceeding to subject his land to the payment of the debt of his ancestor, for the

satisfaction of which the personalty is the primary fund by our law, as it was at common law.

This being assumed, how does this case stand on the facts? The proof is clear and definite that this judgment was confessed by the administrator, not because he admitted, and was satisfied of the correctness of the claim of the plaintiff, but upon an agreement that the land should be sold, (as they thought they might do) and bought in by plaintiff, who was then to hold it for the daughter of Robert Kyle, she being his niece. This agreement the administrator swears was reduced to writing, and placed in the hands of A. A. Kyle, we believe, for safe-keeping. It is not produced it is true, but Kyle is examined as a witness in this case, and no effort is made to disprove this allegation. The plaintiff himself makes no statement in denial of this fact, although his deposition is taken in the case. Under these circumstances we are compelled to take the facts to be as stated by White. It is further shown by White, the administrator, that in comparing the respective claims of himself, as administrator, against complainant, and complainant's claims against the estate, there was found to be only a few dollars, perhaps about fifteen, and this on the assumption that all claims then shown were to be allowed, as just, which the administrator swears he could not and did not admit. In the face of all this, probably from a mistaken feeling that he ought to save the land for the infant daughter of the intestate, he consented to allow the judgment to go against him, with an agreement, however, that all proper credits were ultimately to be allowed. We need but say, that the judgment thus obtained cannot be allowed to stand for anything against the heir, who was no party to it. It must go for nothing in this investigation. While a judgment *bona fide* obtained against the administrator might be *prima facie* evidence of the indebtedness of the estate, a judgment like this, confessed contrary to the truth of the case as understood by the administrator at the time, can only affect him, but can have no weight whatever against the heir, who was not party to it. We need not go into other questions presented in argument. If it be true, as seems to be held by a uniform current of decisions since the case of *Gilman v. Tisdale's heirs*, 1st Yer., 288-9, that unless the plea of fully administered or no assets is found in favor of the administrator, the creditor has no right to go against the land in the hands of the heir, either in law or equity, and the Act of 1827 does not change the rights of the parties or policy of the law, but only gives a different mode of proceeding. Complainant must fail in any view

of his case. See, also, 2d Yer., 65; *Peck v. Wheaton's heirs, Martin & Yer.*, (Coop. Ed.) 358-360.

We need not discuss this case in any other aspect of it, nor authoritatively settle the question suggested in this case, as to effect of failure of administrator to plead, no assets, or fully administered, this being the only claim before us in such form as to be considered. If failing for the reason given, the bill should have been dismissed. It is proper to say, in the language of the Court, in *Peck v. Wheaton's heirs, Martin & Yer.*, 358, that the creditor has ample remedy for his debt on the bond of the administrator, as well as a personal remedy against him and his estate, on suggestion of *devastavit*, based on the judgment against him.

The decree of the Chancellor will be reversed, and the bill dismissed, with costs of this and the Court below. Nothing is adjudged on the *alternative* prayer of the cross bill for an account against White, administrator. The decree in this case not to prejudice such right in any other proceeding for said purpose.

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## KIRKPATRICK v. KIRKPATRICK.

Nashville, December Term, 1872.

1. EVIDENCE—ATTESTING WITNESSES TO A WILL—OPINION OF.—Subscribing witnesses only may give their opinion as to the sanity of testator, without giving their reason.

2. SAME—PHYSICIANS.—A physician may state his deduction, as matter of professional opinion, from facts stated by others, or observed and stated by himself.

3. SAME—OTHER WITNESSES.—Other witnesses must state facts, and upon these facts, *observed by themselves*, they will be permitted to give their opinion, whether upon such facts they believe testator to be of sound or unsound mind. From the state of the testator's mind, to be ascertained from the facts and not from opinion, the jury is to determine the question whether the testator had capacity to make a will. But whether the particular phase of mental unsoundness deprives a person of testamentary capacity, is a matter for the exclusive determination of the Court and jury.

4. ARGUENDO.—After all it may be said to be a practice of questionable propriety to permit any witness to bring into the scales his private opinion, even upon facts observed and stated by him as to the testator's sanity.

CASES CITED.—1 Phil. Ev., 661; 1 Greenl. Ev., § 440; 15 Ohio, 19; 9 Yerg., 333; 2 Cold., 139; 6 Cold., 39; 1 Red. Wills; Vid. 1 Redf.; N. Y. Sur. Rep., 118.—[Ed.]

SNEED, J., DELIVERED THE OPINION OF THE COURT.

This issue *devisavit vel non* on a paper propounded as the will of Amos Kirkpatrick, deceased, resulted in a verdict and judgment against the will. The Court erred in permitting certain witnesses to state their *opinions* as to the testator's mental capacity "to make a reasonable disposition of his property." This was a mixed question of law and fact, and the very inquiry to be determined by the jury upon the facts. With certain qualifications the opinion of that class of witnesses are received as to the soundness or unsoundness of the testator's mind, but the question whether the particular phase of mental unsoundness deprives a person of testamentary capacity, is a matter for the exclusive determination of the Court and jury. The law places the subscribing witnesses about a testator when he is making his will, to judge of and attest his capacity. They only, therefore, may state their opinions as to the sanity of testator, without giving their reasons. The physician may state his deduction, as matter of professional opinion, from facts stated by others, or observed and stated by himself. Other witnesses must state facts, and upon these facts, *observed by themselves*, it has grown to be a practice to permit them to give their opinion, whether upon such facts they believe the testator to be of sound or unsound mind. From the state of the testator's mind, to be ascertained from the facts and not from opinion, the jury is to determine the questions whether the testator had capacity to make a will. The rule is briefly stated thus: The witness cannot be asked a question, the answer to which involves matter of law, as well as matter of fact, as whether the testator was capable of making a will.—1 Phil. Ev., 661; 1 Greenl. Ev., § 440; Runyan v. Price, 15 Ohio, 19; Gibson v. Gibson, 9 Yerg., 333; Van Huss v. Ramboldt, 2 Cold., 139; Puryear v. Reece, 6 Cold., 39. The question before the jury is not one of mere vigor of intellect, or a want of it—not one of mere mental soundness or unsoundness—but whether the state of the mind, whether sound and vigorous, or otherwise, is such as the law recognizes as capable of making a valid testament. This is not to be determined by opinions, but by facts. After all it may be said to be a practice of questionable propriety to permit any witness, other than an attesting or a professional witness, to bring into the scales his private opinions, even upon facts observed and stated by him, as to the testator's sanity. There



are confessedly but few more delicate or difficult matters of inquiry brought before the Court than these questions of testamentary capacity; and it is the common experience of lawyers who have observed the course of these litigations, that the validity of wills, in the judgment of the jury, is too often made to depend upon the opinion of some doughty citizen of influence in the vicinage, who is as often as otherwise the partizan or the clansman of one or the other party. It is not every feeble, or eccentric, or aberrant mind that may not be a sound and disposing mind in the sense of the law. For it may appear that at the very hour of the execution of the will there was an interval of perfect testamentary capacity. The essence of the testamentary act is the volition of a mind, whether young and vigorous, or old and enervated, that yet has capacity to understand what it is about, to gather in all the subjects of its disposition and to remember all the objects of its gratitude and affection. "If," says the Touchstone, "some friend of a sick man of their own heads, shall make a will, and bring it to a man in extremity of sickness and reads it to him, and ask him whether this shall be his will or no, and he say yea, the testimony is very suspicious." Here, however, a Court and jury would have facts to be judged of, and not the opinions of men as a basis of judgment. But the question when and how to fix, what D'Aguepean calls "the doubtful and uncertain point, when reason vanishes and incapacity appears," has baffled the skill of the most scientific men, and is certainly too grave a matter to be determined upon the mere opinion of witnesses of the class referred to.—Vid. 1 Redf.; N. Y. Sur. Rep., 118. But yet, the practice is tolerated of allowing this class of witnesses to give their opinion as to the general question of the mental capacity of the testator, as deduced from facts observed and stated by them. But we apprehend there can be but one sound opinion as to the propriety of extending the rule so as to permit them to give to the jury their naked opinions as to the capacity of the testator to make a will.

The judgment is reversed and the cause remanded for a new trial.

**SALATHIEL RILEY *et al.* v. JOHN FROST *et al.*****Knoxville, September —, 1877.**

**LEVY—INSUFFICIENCY OF—ASSURANCE OF TITLE—STATUTE OF LIMITATIONS.**—The description in the levy in controversy was as follows: "Levied October 7, 1857, on 100 acres of land, the property of Salathiel Riley and Francis Fannin, adjoining Joel W. Jarvis, in the 5th district."

*Held*, the levy is insufficient, and the Sheriff's deed upon the same is inoperative, and not an assurance of title, or an effective muniment to create a title under the statute of limitations.

**CASES CISED.**—2 Yerg., 394; 3 Yerg., 177; 1 Hum., 80; 7 Hum., 181.—[Ed.]

**SNEED, J., DELIVERED THE OPINION OF THE COURT.**

This is an action of ejectment brought in the Circuit Court of Hancock County by the heirs at law of Frances Fannin, deceased, against the heirs at law of Tawce Gower, deceased, to recover a tract of land of two hundred and fifty acres lying in the said county.

The action was begun on the 20th of September, 1875, and the issues, upon waiver of a jury, were submitted to the Circuit Judge, by whom they were determined in favor of the defendants, from which judgment the plaintiffs have appealed, in error.

The defendants pleaded the general issue and the statute of limitations of seven years. The declaration describes the tract of land sued for, of two hundred and fifty acres, by metes and bounds, and there being no disclaimer of possession of any portion of the land sued for, filed by the defendants, the plea of the general issue admits the possession of the whole tract, and the effect of the judgment below is to vest the whole in the defendants, as an absolute estate in fee under a Sheriff's deed, as an alleged assurance of title, which only purports to convey to the defendants' ancestor one hundred acres. We need not deraign the plaintiffs' title, as it is conceded to be good, unless the defendants have acquired a paramount title by the laches of the plaintiffs, under the statute of limitation.

The facts are, that the defendants' ancestor, Tawce Gower, on the 30th of August, 1856, recovered a judgment before a Justice of said county against Enos Carter, James Riley and Salathiel Riley, upon which the ancestor of the plaintiffs, Frances Fannin, became the stayor. On the 7th of October, 1857, an execution under this judgment, for about \$41.66 and costs, was levied by a Constable on "100 acres of land, the property of Salathiel Riley and Frances Fannin, adjoining lands of Joel W. Jarvis, in the 5th District." On the 2nd day of August, 1858, Sheriff Camp-

bell, of said County of Hancock, sold said land at public sale to Tawce Gower, for \$52.90. On the 12th February, 1862, Sheriff Rains executed to said Tawce Gower a Sheriff's deed, reciting the foregoing facts, with no other description of the land conveyed than such as it is assumed was given in the levy, in the words, "levied October 7, 1857, on 100 acres of land, the property of Salathiel Riley and Frances Fannin, adjoining lands of Joel W. Jarvis, in the 5th District." It appears in proof that the tract of land of 250 acres, now in controversy, did adjoin the lands of Jarvis and others, but that it lay north of a ridge, and was worth at the time of the Sheriff's sale about \$1,000.00. It appears, also, that Salathiel Riley, one of the principals in said judgment, owned a tract of land of less than 100 acres, lying south of the ridge, and adjoining the lands of Joel W. Jarvis, in the 5th District, worth at the time of the sale about \$1,000.00, and it cannot be doubted, from the proof, that the land of Salathiel Riley was the land levied on and sold, and the same attempted to be described in the deed. Under the said sale the said Salathiel Riley surrendered the land to Tawce Gower, in his life-time, who used and occupied it as his own. It is in proof, also, that Frances Fannin and Salathiel Riley owned no lands jointly. The land in controversy was conveyed by one Kerolett to Frances Fannin, on the 20th November, 1850, and he held and occupied the same from that time until the spring of 1865, when the troubles incident to the civil war led him to move into Virginia, where he died in 1868. From the time of the said levy, and the sale in August, 1858, up to the time of Frances Fannin's removal to Virginia in 1865, the defendants' ancestor, Tawce Gower, asserted no claim whatever to the land in controversy, but did assert a claim to the smaller tract of Salathiel Riley. When Frances Fannin went to Virginia he left the land in controversy in the control of an agent, who had control of it until late in 1866, when Tawce Gower, without the consent of Fannin and against the remonstrances of his agent, entered upon the land, and held and claimed it until 1871, when he died.

This action was brought, as we have seen, on the 20th September, 1875, and upon this character of possession, and under the said Sheriff's "assurance of title," the Circuit Judge held that the defendants were protected, and hold the lands by absolute title in fee. As a matter of fact, we think it is clear that the description of the 100 acres, as given in the levy and Sheriff's deed, has no reference to any part of the Fannin tract of 250 acres, all of which the defendants have recovered in this action.

But the rights of the parties must be determined upon the validity of the levy and sale, and upon the terms of the Sheriff's deed as an assurance of title. We hold that the description of the land in the levy and deed is too vague, indefinite and uncertain to be recognized or sustained as an assurance of title under our law. Without reference to the extraordinary feature of the case, that upon an alleged assurance of title for only one hundred acres, the defendants have an absolute title adjudged to them of two hundred and fifty acres, we are constrained to hold that the deed is a nullity, even as to the one hundred acres it purports to convey, for the want of a sufficient description of the lands levied on and sold. This Court has laid down certain rules upon this subject, which must not be departed from. It was said in the case of *Henderson v. Overton*, 2 Yerg., 394, that "as an assurance of title, a Sheriff's deed stands lower than any other." The land, it is true, need not be described in a levy with specific accuracy, by metes and bounds, but a general description will answer, provided it is sufficient to distinguish it from other lands. And if the levy description is in itself defective, the title does not rest upon the description in the levy, but the deeds may come in aid of it, if that defines the locality with sufficient precision. *Vance v. McNairy*, 3 Yerg., 177; *Parker v. Swan*, 1 Humph., 80. The rule is that the levy must, at least, be so definite that purchasers must have the means of knowing what land is to be sold, so as to form an estimate of its value; and there must be such an ascertainment, by description, of identity as shall prevent one piece of land from being levied on, and a distinct piece conveyed.—*Gibbs v. Thompson*, 7 Humph., 181. The description in this case is "100 acres of land, the property of Salathiel Riley and Frances Fannin, adjoining lands of Joel W. Jarvis, in the 5th District." How would a Sheriff or a purchaser identify the land sold under such a description? Was it an attempt to levy on a hundred acres of Frances Fannin and Salathiel Riley as tenants in common? How and where could such a tract be found in the face of the proof that they owned no land jointly? We must hold the levy insufficient, and the deed inoperative and not an assurance of title, or an effective muniment to create a title under the statute of limitations.

Reverse the judgment, and let judgment be entered here for plaintiff.

LEVISAY *v.* DELP *et al.*

Knoxville, September 15, 1877.

1. CHANCERY COURT—HAS NO POWER TO PROTECT PARTIES POSSESSING STATUTE PRIVILEGES AND FRANCHISES—WHEN.—*Statement*: The banks of the river are owned by different persons, both run a ferry and have the same landing, one with, the other, without a license.

*Held*, land may be appropriated to the use of a public ferry as an easement for the benefit of the public, but a person who runs a ferry, under a license, has no such rights against third persons, who set up an opposition without license, as a Court of Equity can protect by injunction or otherwise.

CASES CITED.—Story Eq. Jur. Vol. 2; Berry Ed., § 927; 3 Yerg., 390; Code, Sections 1241, 1242 and 1248.

2. EVIDENCE—RECORDS OF COUNTY COURT ARE—WHEN.—In Courts of Equity the records of the County Court, when duly certified to and regularly filed as evidence, become such as much as a deposition or any other testimony.—[Ed.]

FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

This bill was filed to enjoin defendants from carrying on a ferry on Clinch river, to the injury of complainant's ferry, which was licensed by the County Court of Hancock County, in 1873, and had been kept up by him from that time.

The proof shows complainant owns an undivided interest in the land on the north side of the river. Defendants in January, 1876, had bought a small portion of the land, including the landing, on the south side, and soon after commenced to run their ferryboat, both parties using the same landings. It will be seen that this is not a contest between two rival claimants for a license to establish a ferry, as in most of the cases reported in our books. Complainant has his license, and by virtue of it enjoys the ferry franchise. His complaint is, that another party is engaged in running a ferryboat at the same place from the opposite side of the river, and his contention is, that the Court shall stop this by injunction.

We do not say that there may not be cases where a Court of Chancery would intervene to protect the rights of a party, for an "injunction may be granted," says Mr. Story, (Eq. Jur., vol. 2; Berry Ed., § 927,) "in favor of parties possessing a statute privilege or franchise, to secure the enjoyment of it from invasion by other parties. The right would have to be clear and exclusive in such cases, and in England established, if disputed, by a verdict, before a perpetual injunction would be decreed."

In our State, the ferry franchise is deemed one of public interest, standing on the same footing as a public road, and the land of a party may, on this principle, be appropriated to the use

of a public ferry, as an easement for the use of the public.—See 3d Yer., 390.

The County Court, by Sec. 4,206 of the Code, is given the general supervision over roads and ferries, to establish and regulate the same.

By Sec. 1,241, the *owner* of both banks of the river is entitled to have a ferry, upon application to the County Court.

By Sec. 1,242, where the banks are owned by different persons, each owner is entitled to keep a ferry; and each is entitled to transport persons across the river, and land them on the opposite bank.

By the next Section of the Code the County Court must authorize the ferry in such case, however, and is required to take a bond for faithful performance of the duties imposed by law.—See Sec. 1,248.

The result of this is, that while complainant is entitled, under his license, while it is unrevoked, to run his ferry, as against the other party he has no exclusive rights, which a Court of Equity ought to enforce, any more than a licensed merchant would have as against an unlicensed dealer, who might sit down and commence business by his side. The latter would violate the law by thus engaging in the business without license, but would not be answerable to the other party for such violation in a Court of Chancery. It would be an idle exercise of the injunctive power by the Court to restrain him in this case, when, as owner of one bank of the river, he may apply to County Court and obtain a license or order establishing his ferry; this legalizing it at next Term of that Court.

It is, perhaps, proper to refer to the question made by counsel, that the record of the County Court is not evidence in this case, because not made so by bill of exceptions. The cases referred to by counsel have no bearing on this case. They were at law. In this, the record duly certified, was regularly filed as evidence in the case, and became evidence, as much as a deposition or any other testimony.

On the whole case the Chancellor's decree dismissing the bill is correct, and we affirm it with costs.

**H. HARKLEROURD, *in error*, v. JOHN NAVE.****Knoxville, October 12, 1877.**

**CROSS-ACTION—MAY BE MAINTAINED—WHEN.**—Nave sued Harkleroud for balance due as price of mill wheels. The defence was a warranty as to the wheels, and a breach of said warranty.

*Held*, in such case a party has the right to show damages by way of cross-action, arising from breach of warranty, though he had not first tendered back or offered to return the wheels purchased.

**CASES CITED.**—3 Sneed, 434; 2 Head., 248-9; 1 Head., 266; Code, Section 2918.—[ED.]

**FREEMAN, J., DELIVERED THE OPINION OF THE COURT.**

Nave sued Harkleroud on note for balance due as price of mill wheels. The defence was a warranty as to the wheels and breach of said warranty.

The Court charged the jury that the defendant could not recover, by way of set off or cross action, any damages for assumed breach of the warranty, unless he had first tendered back, or offered to return the wheels purchased.

This was erroneous. The case of *Rossor v. Hancock*, 3d Sneed, 434, is supposed to sustain this view of the law, but that was not an action on the warranty, but upon a deceit and fraudulent representation as to defects known to the vender at the time of the sale. Admitting that case to have been correctly ruled, which may be doubted, the rule laid down has no application. In fact that case is explained in 2nd Head, 248, as applying only where the vendee proposes to rescind the contract, and then he can recover for the fraud, but must first tender the property back. In this view it is correct. The case cited—2nd Head, 249—distinctly holds further, that the case of *Rossor v. Hancock* was to be confined to a suit for fraud or deceit, when there was a warranty, which is not sued on.

The party had the right to show damages by way of cross action arising from breach of warranty, by Sec. 2,918, as was properly held in the case of *Ford v. Thompson*, 1st Head, 266.

For the error in the charge of the Court, let the judgment be reversed and case remanded for new trial.

WM. H. RAMBO *v.* R. A. DONELLY *et al.*

Knoxville, October 12, 1877.

**REDEMPTION OF REAL ESTATE—PARTIAL PAYMENTS.**—The purchaser may receive partial payments or demand the full amount. In the absence of any other agreement, partial payments must be understood, with reference to the redemption laws, and by the favor of the purchaser. If at the end of two years the whole amount be not paid, the purchaser becomes debtor to the original owner to the extent of the amount paid, which may be recovered either in Chancery or by an action at law.

CASES CITED.—Code, Sections 21, 24, 26.—[ED.]

TURNER, J., DELIVERED THE OPINION OF THE COURT.

By §§ 21, 24 and 26 of the Code, "Real estate sold for debt shall be redeemable at any time within two years after such sale."

"Any debtor whose interest in real estate has been so sold and is subject to redemption, may redeem said interest by paying to the purchaser, or to any one claiming under him, the amount bid or paid by him, with interest thereon at the rate of six per cent. per annum, together with all other lawful charges."

Under this statute the purchaser may demand the full amount in one payment and refuse partial payments; yet, under the statute, he may receive partial payment from time to time, and if by such partial payments, made within the time prescribed, he shall receive the full amount, with interest and other lawful charges, the redemption is complete.

In the absence of agreement to the contrary, a partial payment on the amount necessary to redeem must be understood to be made with reference to and in pursuance of the redemption laws, and by the favor of the creditor or purchaser.

The indulgence by the purchaser and his relaxation of the rigor of the law, cannot be construed a waiver of his title acquired by the purchase and its conversion into a mortgage. If, after partial but without full payment, the two years expire, the purchaser, or those claiming under him, becomes debtor, to the extent of the payments, to him whose land has been sold, which may be recovered in an action at law or proper proceedings in chancery.

Reverse the decree, with costs. Enter proper decree here.



W. P. TESTAMAN *et al.* v. HIRAM HOLT.

Knoxville, September 15, 1877.

SHERIFF—MOTION AGAINST FOR INSUFFICIENT RETURN.—A petition which assigns as the only reason for the non-execution of process, that the Sheriff's term of office would expire very soon after it came to his hands, is insufficient. In contemplation of law he was still the Sheriff, and his official term continued, as a matter of law, until the qualification of his successor. He should have made the levy, and not have risked the contingencies by which the plaintiff may have lost his debt.

CASES CITED.—2 Sneed, 18; 5 Cold., 223; Code, §§ 368, 369; Const. of Tenn., Art. 7, § 5.—[ED.]

SNEED, J., DELIVERED THE OPINION OF THE COURT.

This was a motion in the Circuit Court of Hancock County against the Sheriff and his securities for the insufficient return of an execution.

The motion was allowed and judgment rendered against the defendants for the amount due on the execution, and costs. This execution, on this judgment, was superceded upon a petition for writ of error *coram nobis*, which, upon motion, was dismissed.

The return complained of was in the words and figures following:

"Came to hand August 23, 1876, too late to be executed, therefore is not satisfied. September 2, 1876.

(Signed) W. P. TESTAMAN, Sheriff.

The return term of the execution was held on the fourth Monday in September, 1876, and the only reason assigned in the petition for the non-execution of the process was, that the defendant's term of office would expire on the 4th of September next after the execution came into his hands. The Circuit Judge very properly dismissed the petition. The return on its face is insufficient. It was the simple duty of the Sheriff to obey the mandate of the Court, by making a levy, and not to abide any of the contingencies by which the plaintiff may have lost his debt. The eight or ten days in which he held the process in his hands, gave him ample time for this. If the return had set forth all the facts in exculpation that are shown in the petition, the return would not have excused him. For all the purposes of this case in contemplation of law, he was still the sheriff; and, indeed, his official term continued, as a matter of law, until the qualification of his successor.

But this Court has held that the officer who commences the execution of a writ of *fieri facias*, is bound to finish it. If he

has levied the writ on the goods of the debtor, he cannot even deliver the writ and the goods to his successor in discharge of himself, but must sell the goods, and make proper return, in the same manner as if his office had continued.—Campbell, Gov., v. Low *et al.*, 2 Sneed, 18; 5 Cold., 223; Code, §§ 368–369; Const. Tenn., Art. 7, § 5.

Affirm the judgment.

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CONDUCTED BY  
JAMES C. BRADFORD,  
OF THE NASHVILLE BAR.

List of Journals from which Abstracts are taken :

NAME.	ABBREVIATION.	ADDRESS.	PUBLISHED.	PRICE.
Albany Law Journal	Alb. L. J.	Albany, N. Y.	Weekly.	15 cents.
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## ABSTRACTS.

**COMMON CARRIER.** When Liability Commences and Terminates. The liability of a common carrier commences when the goods are delivered to him or his authorized agent, and is discharged by the delivery of the goods. If he is an intermediate carrier, this duty is performed by a delivery to a succeeding carrier for further transportation and an acceptance by him. *E. G. Pratt v. Grand Trunk R. R. Co.*, Sup. Ct. U. S.—[Ch. L. N., Nov. 17, 1877.

**CORPORATIONS.** Dissolution. Debts Due and Owing. The doctrine of the common law, that on the dissolution of corporations, due and owing to or by the corporation become extinct, has

become obsolete. *McCoy et al. v. Farmer et al.*, Sup. Ct. Mo.—[L. & E. R., Nov. 7, 1877.

**DEED.** Delivery. To constitute a delivery of a deed, the grantor must, by act or word, or both, part with all right of possession and dominion over the instrument, with the intent that it shall take effect as his deed, and pass to his grantee. The commitment of a deed to a third person, with the reservation of the right on the part of the grantor to withdraw it at any time before his death, and in case it was not so withdrawn, to be retained until the death of the grantor, and then to be delivered to the grantee, is no legal delivery, and will pass no title to the grantee. *Brown v. Brown*, Sup. Ct.

Maine. — [Am. L. Rec., November, 1877.

**EASEMENT. Extinguishment.** An easement appurtenant is extinguished when the dominant estate ceases to use it, and is itself the dominant estate, so disposed that the easement is of no use or value. *Canney v. Andrews*, Sup. Ct. Mass.—[L. & E. R., Nov. 7, 1877.

**EVIDENCE. Preponderance of in Civil Cases.** The party holding the affirmative in an issue in civil cases, is required to adduce such a preponderance of evidence as will satisfy the jury to a reasonable certainty, not to an absolute moral certainty, of the facts alleged. *Sparks v. Dawson*, Sup. Ct. Tex.—[1 Tex. L. J., No. 3.

**LIBEL. 1. Privileged Publication.** Where a Court or public Magistrate is sitting publicly, a fair account of the whole proceedings, uncolored by defamatory comment or insinuation, is privileged, whether the proceedings are on a trial or on a preliminary and *ex parte* hearing.

**2. Same.** To make it privileged there must be at least so much of a public investigation as is implied in a submission to the judicial mind with a view to judicial action.

**3. Same. Publishing Contents of a titition for Divorce.** A petition for divorce was filed in the Circuit Court against plaintiff, charging her with adultery. Defendant, before the petition was brought before the Court for judicial action, published in its newspaper the substance of the petition without defamatory comments. *Held*, that the publication was not privileged, but that the law presumed malice therefrom, and that an action for libel would lie.

**4. Same. Malice Question for the Jury.** But the question of malice is one for the jury on all the facts in

evidence, and it is not for the Court to say whether or not the defendant has, by its testimony, rebutted the presumption arising from the publication. *Belle Barter v. St. Louis Dispatch Co.*, St. Louis Court of Appeals.—[Cent. L. J., Oct. 26, 1877.

**MARRIED WOMEN. Promissory Note. Separate Estate.** A promissory note was given by a husband and indorsed by the wife in these words: "I hereby bind and charge my separate estate for the payment of this note." *Held*, that the indorsement upon which the credit was given was sufficient consideration to support the contract, and because the note was given and accepted under the circumstances, the debt is considered in law to have been contracted for her benefit, and her separate estate will be held liable for the payment of the note. *Budinger & Hof, v. Teresa Gobel*, Sup. Ct. Ohio.—[Am. L. Rec., November, 1877.

**MANDAMUS. To Compel Issuance of Certificates of Stock.** Where the relator claims that he is the owner of, and entitled to, certain certificates of mining stock, which the trustees of a corporation refuse to issue to him. *Held*, that a mandamus is not the proper remedy, as he has an adequate remedy at law by an action against the corporation for the value of the stock claimed. *State, ex rel. Elliott, v. Guerrers*, Sup. Ct. Nevada.—[L. & E. R., Nov. 7, 1877.

**NEGLIGENCE. Construction of Telegraph Line. Unusual Casualty.** Where a storm of unusual severity occurs, such as could not have been reasonably expected, and blows down one of the poles of a telegraph line, although properly constructed, and thus injures a person passing by, it is error to instruct the jury that the telegraph company were liable for not constructing

the lines in such a manner as to resist the violence of the storm.

**Duty of the Company. Degree of Care in Construction.** A telegraph company is bound to use such reasonable care in constructing its line that travellers should not be injured by it; it is not bound to render it absolutely safe for the public. *Ward v. Atlantic & Pacific Telegraph Co.*, N. Y. Ct. of Appeals.—[L. & E. R., Nov. 7, 1877.

**PARTNERSHIP. Execution. Levy.** Where an execution, in favor of an individual creditor of one of the members of an insolvent partnership, is levied upon his interest in certain goods belonging to the firm, an action will not lie by the other partners for a perpetual injunction to restrain the Sheriff from selling, even though the officer and the creditor have notice of the partnership. The purchaser would acquire only such interest as the execution debtor had, subject to all the firm liabilities. *Wickam v. Davis*, Sup. Ct. Minn.—[L. & E. R., Nov. 7, 1877.

**Test of Partnership. Participation in Profits.** The right to participate in the profits of a business is a strong *prima facie* test of partnership, but is not conclusive. The *intention*, when ascertained, must control. *In re Howard*, Ct. of Appeal (English).—[L. & E. R., Nov. 7, 1877.

**PROMISSORY NOTES. Party Both Maker and Indorser. Notice.** Where one draws a note payable to himself,

there is no contract until he endorses it to some one, and his endorsement becomes a direct, not a contingent, liability. He is, in fact, the maker, and not entitled as endorser to notice of dishonor.

**Signing as Executor. Liability.** The maker of a note who signs as "executor of A. B.," does not thereby limit his individual liability thereon. *Aughinbaugh v. Roberts*, Sup. Ct. Penn.—[L. & E. R., Nov. 7, 1877.

**RAILROAD. Injury to Employees. Latent Defects in Machinery. Duty of Company.** It is the duty of a railroad company to use due care and skill in providing safe machinery for its employees to operate, and to adopt and apply all reasonable tests to discover defects in its machinery, but it is not responsible for injuries received by its employees through latent defects of machinery, where due care has been taken to provide against such defects. *Smith v. Chi. & M. & St. P. R. R. Co.*, Sup. Ct. Wis.—[Cent. L. J., Nov. 16, 1877.

**TAXATION. Due Process of Law.** The constitutional provision, that no State shall deprive any person of life, liberty or property without "due process of law," does not mean a judicial proceeding. The summary collection of taxes, without a previous judgment of a Court, competent jurisdiction does not violate this provision of the Constitution. *McMillan v. Anderson*, Sup. Ct. U. S.—[Chi. L. N., Nov. 17, 1877.

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VOL. I. NASHVILLE, TENN., JANUARY, 1878. No. 9.

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MAHULDA J. LOVELACE *v.* WILLIAM & A. J. LOVE-  
LACE.

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Knoxville, June Term, 1875.

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1. **HOMESTEAD—DOWER—WIDOW ENTITLED TO BOTH—WHEN.**—The right of dower is unaffected by any legislation creating a homestead, except as to the mode of its assignment prescribed by the act of 1873. The widow of an intestate, dying seized and possessed of real estate, is entitled to both homestead and dower.

2. **MODE OF ASSIGNMENT.**—The homestead shall first be set apart, as dower is set apart by the same commissioners, and then one-third of the remainder will constitute the dower.

**AUTHORITIES CITED.**—Constitution of 1870, Art. 11, Sec. 11; Code, Sec. 2,114; Act of 1873, Ch. 98, Sec. 1.—ED.

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DEADERICK, J., DELIVERED THE OPINION OF THE COURT.

The record in this case, upon an agreed state of facts, presents the question whether the widow of an intestate, dying seized and

possessed of real estate, is, under our laws, entitled to take both dower and homestead in said lands.

The Circuit Judge, to whom the question was submitted by agreement, so held, and the defendants, heirs at law of said intestate, have appealed to this court.

The right to dower is not questioned, but it is insisted that the later acts, passed since the adoption of the Constitution of 1870, were intended to enlarge that right by protecting the homestead to the value of \$1,000, exempting it from forced sale, and protecting it from alienation by the husband, without the consent of the wife.

Art. 11, Sec. 11, of the Constitution, declares that "A homestead in the possession of each head of a family, and the improvements thereon to the value, in all, of one thousand dollars, shall be exempt from sale under legal process during the life of such head of a family, to inure to the benefit of the widow, and shall be exempt during the minority of their children occupying the same." Nor shall it be alienated without the joint consent of husband and wife, etc.

Code, Sec. 2114 a. contains the enactment of the second session of the Legislature of 1870, embodying substantially the provisions of the Constitution above quoted. The act of 1873, Ch. 98, Sec. 1, directs that the homestead inuring to the benefit of a widow, shall be set apart as dower is set apart, and by the same commissioners, and where she is entitled to both out of the same lands, the homestead shall first be set apart, and then one-third of the remainder in value, as dower, etc.

There is nothing in the provision of the Constitution referred to, nor in any legislative acts subsequently adopted (passed?) which can be held as qualifying or restricting the widow's right to dower: while the act of 1873 clearly recognized the right to both dower and homestead, and prescribes the mode in which both are to be assigned.

The hardships and apparent injustice suggested in the argument may, in some cases, arise under the law as we construe it. But we are of opinion that the right of dower is unaffected by any legislation creating a homestead, except as to the mode of its assignment prescribed by the act of 1873—and the law giving the homestead is equally explicit—so that we are compelled to hold that the judgment of the Circuit Court is correct and must be affirmed.



TONCRAY v. TONCRAY, *Executor, etc.*

Knoxville, October 13, 1877.

1. INFANCY—PARENTS LIABLE FOR MAINTENANCE—WHEN.—A brother, as a volunteer, undertook the maintenance and education of his sister, who had abandoned her father's home, and without his fault.

*Held*, under such circumstances, no promise to pay by a mere volunteer for the maintenance of the child, can be implied on the part of the parent. He who intervenes in such a case, to make the child independent of the parent, does but encourage its alienation from the line of filial duty, and stands in no relation to be favored by the law.

2. ARGUENDO.—The father was bound to support his child, and that obligation might be enforced against him as a legal duty, if she had been compelled, by bad treatment, to abandon the paternal roof, the law would compel him to furnish the infant daughter, under such circumstances, the necessities of life. The parent is bound by positive law to protect, to educate, if able to do so, and to maintain his child during its minority, or until its voluntary abandonment of the parent's protection. But the duties of the relation are mutual and reciprocal. The parent is bound to provide for the child; but he is, on his part, entitled to the obedience, to the custody, and to the services of the child. If the authority of the parent is abjured by the child without any necessity occasioned by the parent, all legal obligation to provide for the child is at an end; and, in such a case, the parent cannot be made liable for even necessities furnished his child by a volunteer, except by his consent.

CASES CITED.—Tyler Inf., 101; Par. Cont. 254; Chitty Cont. 119; 2 Story Eq., 1,399, 6 vol.; Gordon v. Potter, 19 Verm., 330; Raymond v. Loyles, 10 Barber, 483; Mortimore v. Wright, 6 M. & Y., Scoul Dom., Rel. 328, *et seq.*; 2 Story Eq. 1,349, 6 vol.; Gordon v Potter, 17 Verm., 348; Tyler In., 111.

## SNEED, J., DELIVERED THE OPINION OF THE COURT.

The action is brought by A. R. Toncray for the use of Wm. J. Toncray, his brother, against Chas. P. Toncray as Executor of Jackson C. Toncray, dec'd, the father of the nominal and real plaintiff and the defendant, in an account for board, tuition and clothing furnished by A. R. Toncray to his sister Julia. The account is for \$857. and it was sold and transferred by A. R. Toncray to Wm. J. Toncray for, at net, \$105. and this action is brought for the use of the latter upon the following state of facts: Prior to the year 1868, the date of the first item of account, Jackson C. Toncray, the testator of defendant, and the father of Julia and all the other parties, was living in Abingdon, Va., where he was keeping house. His daughters, one of whom was Julia, was living with him, his wife having died in 1862. The old man was possessed of a small estate, amounting to three thousand dollars or more. While his daughters lived with him, he provided for them in every proper manner. They left him alone and went to Iowa, without fault on his part, as far as we are advised by the record. He complained of this and said they had not treated him right, and declared his intention to do noth-

ing more for them. The old man left Abingdon and came to Elizabethton, in Carter county, Tenn., and from that time to the time of his death in 1874, he had his abode with one of his sons in Elizabethton. The daughter, Julia, came back from Iowa to Carter county, and was living with one of her brothers when the nominal plaintiff in this action, A. R. Toncray, sent for her and undertook to have her educated and maintained at his own expense, without privity with his father, and this, he says, he undertook with his own free will, without intending or expecting to be reimbursed by his father or any other person. His father, in his lifetime, made no promise of reimbursement, nor did he ever make any such demand of his father, nor did his father ever in any manner recognize any obligation to him, but his father always said he would not pay him; but that if the other boys would do as well by their other sisters as the nominal plaintiff had done for Julia, there would, perhaps, be enough of his estate to compensate them all. After the old man's death, and the qualification of his executor, this action was brought. Upon waiver of a jury trial, the matters in controversy were submitted to the Circuit Judge, who was of opinion that the plaintiff was entitled to recover, and judgment was rendered accordingly for the sum of \$487 and costs. The defendant appealed.

We are of opinion that the judgment is erroneous, and that, upon the foregoing facts, no recovery can be had. The principles of law which must be held decisive of the rights of the parties are obvious and elementary. The brother, in this case, as a volunteer undertook the maintenance and education of his sister, with a full knowledge of the fact that she had defiled the authority of the father—had abandoned his home and protection—and without any intention whatever of ever looking to the father for payment, which the daughter was *sub potestate parentis* in fact, the father was bound to support her, and that obligation might be enforced against him as a legal duty if she had been compelled by bad treatment to abandon the paternal roof. The law would compel him to furnish the infant daughter, under such circumstances, the necessities of life. The parent is bound by positive law to protect, to educate, if able to do so, and to maintain his child during its minority, or until its *pater familiatum* or voluntary abandonment of the parent's protection. But the duties of this relation are mutual and reciprocal. The parent is bound to provide for the child; but he is, on his part, entitled to the obedience, to the custody, and to the services of the child. If the authority of the parent is abjured by the child without any neces-

sity occasioned by the parent, all legal obligation to provide for the child is at an end; and in such a case, the parent cannot be made liable for even necessities furnished his child by a volunteer, except by his consent.—Tyler Inf., 101; Par. Cont., 254; Chitty Cont., 119; 2 Story, Eq., 1399, 6 vol.; Gordon v. Potter, 19 Verm., 350; Raymond v. Loyles, 10 Barber, 483. In points of law, said Lord Abinger, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son, than a brother, or uncle, or a mere stranger would be. Mortimore v. Wright, 6 M. & Y.; Scoul, Dom. Rel. 328, *et seq.* The English cases, says Mr. Story, seem to establish the proposition that the father cannot be made liable for necessities furnished his child by volunteers, except by his own consent, expressed or implied. 2 Story Eq., 1,349, 6 vol. In the case of Gordon vs. Potter, 17 Verm. 348, in case of Redfield estates, the doctrine is thus: "It is obvious that the law makes no provisions for strangers to furnish children with necessities against the will of the parents even in extreme cases, for if it can be done in extreme cases, it can be done in every case where the necessity exists, and the right of the parent to control his own child will depend on his furnishing necessities suitable to the varying tastes of the time. There is no stopping place short of this if any interference is allowed." And thus it was held in Raymond v. Loyles, 10 Bab. 483, that a third person, who supplies an infant with necessities, cannot maintain an action against the parent therefor, unless the latter has expressly or impliedly contracted to pay the amount. Tyler Inf. 111. But the duty of the parent to protect and maintain his minor child, though recognized and enforced by the municipal laws, has its foundation in the *jus excelsior* of natural obligation, which improves the reciprocal duty of respect, obedience and service upon the child thus fostered and maintained. And it is only so long as the child is found in the line of filial duty in this respect that the law will enforce the reciprocal obligations of the parent. In the case before us the child had repudiated this obligation, had abandoned her father's home, and abjured his authority without his fault; and under such circumstances no promise to pay a mere volunteer for the maintenance of the child can be implied on the part of the parent. He who intervenes in such a case to make the child independent of the parent, does but encourage its alienation from the line of filial duty, and stands in no relation to be favored by the law. The nominal plaintiff had voluntarily assumed the burden, with a full knowledge of the facts, and with no expectation of reim-

bursement, and in such a case he cannot be permitted to contravene his good intentions.

Let the judgment be reversed, and judgment entered here for the defendant.

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THOS. MALONEY, *Adm'r, etc., in error*, v. A. B. WILSON,  
*Adm'r, etc., in error*.

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Knoxville, September Term, 1877.

STATUTE OF LIMITATION—REQUEST FOR DELAY.—Where a request for delay is made, the party agreeing not to take advantage of the statute of three years for non-resident creditors, he will not be estopped from pleading the statute of six years in defence of the debt.

CASES CITED.—Charles Lloyd, *Adm'r*, v. Nancy Lloyd, et al., MSS., Code, §§ 2,292, 2,280, 2,281, 2,786.—Ed.

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DEADERICK, C. J., DELIVERED THE OPINION OF THE COURT.

This suit was instituted upon an account by Owen, intestate of Wilson, against Maloney, Administrator of Robert Johnson, deceased, and before a Justice of the Peace.

Judgment was rendered in favor of defendant, Maloney, and the cause was taken by *certiorari* to the Circuit Court, where judgment was rendered for the plaintiff Wilson, and defendant has appealed to this court.

The suit was begun on the 4th day of December, 1875, upon two accounts beginning in 1867, and the last item of which is charged February 8, 1869.

The facts were admitted, and the cause decided by the Judge without the intervention of a jury, by consent of the parties.

It appears that Robert McKee was qualified as administrator of Johnson, 7th of June, 1869, he having died on the 4th of April, 1869; that the accounts sued on were presented to said McKee on the 8th of June, 1872, when he wrote upon the same the following endorsement:

"The within accounts, presented to me as administrator of Robert Johnson, dec'd, and by my special request suit will not be

brought on them for three years from this date, as I have no funds belonging to the estate with which to pay debts against the same. This endorsement does not waive any defense against said accounts, except the statute of three (3) years, the creditor being a non-resident of the State of Tennessee.

ROBERT M. MCKEE,  
*June 8, 1872.*      Adm'r, etc., of Robert Johnson, dec'd."

The Circuit Judge held that this request suspended also the operation of the statute of limitation of six years, and gave judgment for the plaintiff for the amount of the accounts, with interest thereon. At the November term, 1875, of the County Court, McKee resigned as administrator of Johnson, and Thomas Maloney, the plaintiff in error, was appointed and qualified at the same term administrator *de bonis non*. On the 8th of February, 1869, the last charge in the account is changed. From that date to the 4th of December, 1875, when the suit was brought, more than six years had expired, and the statute of six years is relied upon in defence of the action.

It will be observed that the request for delay "does not waive any defence against said accounts except the statute of three (3) years, the creditor being a non-resident."

From this stipulation in the request, it is manifest that the defence of the statute of limitation of six years was not waived. The understanding was that the administrator, too, would not plead the statute of three years, under Sec. 2,279 of the Code, estopping himself from this by requesting delay for a definite time under Sec. 2,280 of the Code.

The statute of six years continued to run, and there is nothing in the request prohibiting the administrator from relying on it, especially as he expressly reserved, in the request for delay, the right to rely on every other defence except the statute of three years. In the case of Charles Lloyd, Adm'r, etc., vs. Nancy Lloyd et al., in an unreported opinion by Judge McFarland, it is said "a request for delay does not prevent the bar of the statute of seven years—Code, §§ 2,281, 2,786—or the statute of six years.

It follows that the accounts were barred by the statute of limitations of six years, and the judgment of the Circuit Court must be reversed, and judgment will be rendered here in favor of the plaintiff in error.

CITY OF MEMPHIS *v.* R. F. LOONEY *et al.*

Jackson, May 19, 1877.

**MUNICIPAL CORPORATIONS—POWER AND MEANS OF COLLECTING TAXES UNDER ACT OF 1873, CH. 102, ETC.**—The city of Memphis filed a bill under the Act of 1873, ch. 102, to which objection was made by demurrer, that the bill alleges the lands and lots had been sold for taxes and bid in by the complainant, and points to no defect of title under the proceeding for sale; that, according to the allegations of the bill, complainant has acquired a perfect title, and her remedy is by an action of ejectment.

*Held*, the Act of 1873 gives the Chancery Court jurisdiction to evict persons from land in behalf of a corporation, that has bid the same in, at the prices of the taxes due thereon.

**2. SAME—SAME—COUNTY COMMISSIONER NEED NOT BE PARTY—WHEN.**—The power given to the County Commissioner to sue is merely cumulative to that of the corporation already vested by law. It is not necessary that the suit should be brought in his name.

**3. SAME—SAME—STATUTE OF LIMITATIONS.**—It is not in the power of the corporation to relieve one and impose upon another a burden, and no laches on its part, or that of its officers, can defeat the right of the public to have collected and rightfully appropriated the public taxes. As against this right, there is nothing of such a character that justice requires an estoppel, or limitation should be asserted.

**CASE CITED.**—Dillon *v.* Municipal Corporation, vol. 2, § 538.

**TURNER, J., DELIVERED THE OPINION OF THE COURT.**

The bill was filed under the act of 1873, Ch. 102, Approved March 21.

The preamble is: "Whereas, the different municipal corporations in this State have, from year to year, become the purchasers of large quantities of land by bidding the same in at the prices of the taxes due thereon; and whereas, by reason of the irregularity and void character of said sales, the said municipal corporations have been defeated for many years in the collection of a large amount of taxes. Now, therefore, for the purpose of effecting an early collection of said taxes by an enforcement of the lien of said municipal corporations upon said lands for the same."

The first section enacts in substance that commissioners, elected under the Act of Dec. 6, 1871, for the collection of taxes due the State, are empowered, if unauthorized by an ordinance of the municipal government, to collect all unpaid taxes due the corporation in accordance with the provisions of this act.

Sec. 2 enacts: "That the revenue collectors of the said municipal corporations shall, within thirty days after the passage of this act, or as soon thereafter as practicable, furnish to said commissioners a descriptive list of all lands and town lots within the corporate limits of the said municipal corporations, which have been condemned and sold for taxes due the said municipal corporations since the year 1865, inclusive, and bought in by the said

municipal corporations and not redeemed, together with the amount of taxes due thereon."

Sec. 3: That such commissioners, upon receiving such list, shall, without delay, proceed to collect the taxes due upon the respective parcels of land described therein; and for this purpose he may file his bill in the Chancery Court for the county where the lands lie, in his own name, as commissioner of revenue for the use of the municipal corporations, and against the parties owning or claiming the lands at the date of the filing of the bill," etc. \* \* \* \* \*

Sec. 3: "The bill shall allege the lien of said municipal corporations upon said lands for unpaid taxes assessed against it, and shall pray for an enforcement of the same by a sale of said land and an application of the proceeds to the payment of said taxes."

The complainant accepted the provisions of this statute by the passage of an ordinance directing the institution of suits.

The demurrer makes the objection that the bill alleges the lands and lots had been sold for taxes, and bid in by the complainant, and points to no defect of title under the proceedings for sale; that, according to the allegations of the bill, complainant has acquired perfect titles, and her remedy is by action of ejectment.

In the absence of the statute the objection might, perhaps, be well; but, as already seen, the preamble and enacting clauses of the statute embrace all lands sold for taxes. The revenue collector for the corporation is to furnish to the county commissioners a list of all lands and town lots which have been condemned and sold for taxes. And such commissioner shall, without delay, proceed to collect the taxes due upon the respective parcels described in the list, and for this purpose may file his bill in Chancery. No distinction is taken as to lands sold under regular proceedings, carrying with them a perfect title by virtue of a sale thereunder, nor are such lands excluded by implication from the operation of the statute, but, on the contrary, are included in its express terms.

The list of all lands and town lots sold, and the taxes due, etc., is the only guide to the commissioner in the bringing of suits. He is not required to investigate titles, to pass upon the regularity of sales, but simply to collect the taxes, and for this purpose may pursue the remedy in chancery given by the statute.

In cases in which the sales are regular and valid, no hurt can result to those for whose taxes the sales were made. The statute

converts the absolute title into a lien, and preserves to the owner the right to re-invest himself upon the payment of taxes due.

The passage of the ordinance for the bringing of the suit, and the institution of the suit by the corporation, is an acceptance of the terms of the statute, and a recognition of the legal title in the original owner, and the claim of a lien merely by the corporation. If, however, such owner prefers, he may disclaim title in himself, and be relieved of costs accruing in the proceedings under the bill to which, by the terms of the act, he must be made defendant.

The statute is to the mutual benefit of the corporation and the tax-payer, in curing the evils of defective sales and relieving against such as are regular and valid. It is argued that the suit should have been in the name of the commissioner, as provided by the law creating the right. We answer: the commissioner for the county is not an officer of the corporation, nor subject to its control, and cannot be compelled by it to bring suit. If the corporation elect to proceed against him for his failure to sue, it must do so by bill in chancery, bringing with him the defaulting taxpayers as well as the list of the lands and lots for which the taxes are unpaid, accomplishing, by this means, precisely the same results as are accomplished in a bill without having him before the court. Besides, the power given him to sue is merely cumulative to that of the corporation already vested by law.

It is urged the statute of limitations of six years obtains as to part of the taxes claimed to be due.

The first item is for the corporate year from January 1, 1868, to January 1, 1869. The statute under which the bill is filed was passed March 21, 1873, and goes back to and includes the taxes due in 1865.

This was, by legislative enactment, an extension, if not an abolition of the statute of limitations (if any existed) as to all taxes not due for the term of six years at the passage of the law. We are of opinion, however, that no statute of limitation will or can apply. We concur in the rule laid down by Judge Dillon in his *Law of Municipal Corporations*, vol. 2, § 538, as follows: "Upon consideration, it will perhaps appear that the following view is correct: Municipal corporations, as we have seen, have in some respects a double character:—one public, the other (by way of distinction) private. As respects property not held for the public use or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes and be affected by



them. For example, in an action on a contract or for a tort, a municipal corporation may plead, or have pleaded against it, the statute of limitations. But such corporation does not own and cannot alien public streets or places, and no laches on its part, or on that of its officers, can defeat the right of the public thereto; yet there may grow up in consequence private rights of more persuasive force in the particular case than these of the public. It will perhaps be found that cases will arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public, but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an *estoppel in pais* as applicable to such cases, as this leaves the court to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not as right and justice may require." We think the rule eminently sound.

The case before us comes strictly within it. All the citizens of the corporation are interested in its taxes and their prompt collection. They are presumed to be levied for the public good, and each citizen who receives the benefits should share the burdens of municipal governments. Taxes are levied and collected for the public use and upon public trusts. It is not in the power of the corporation to relieve one and impose upon another a public burden, and no laches on its part, or that of its officers, can defeat the right of the public to have collected and rightfully appropriated the public taxes. As against this right there is nothing of such a character that justice requires an estoppel, or limitation should be asserted.

Reverse the decree.

LOUISA J. RHEA, *by her next friend*, v. MARTIN R.  
ISELEY *et al.*, *Decided 4 Dec 1871*

AND

MARTIN R. ISELEY v. LOUISA J. RHEA *et al.*

Knoxville, September Term, 1871.

[We publish this case by request of E. S. Hammond, of the Memphis Bar.]

1. **FEME COVERT—CONVEYANCE BY—CLERK'S ACT—JUDICIAL.**—It was the intention of the Legislature to make the execution of a deed, by a married woman, one of the most solemn acts known to the law. The act of the clerk in taking the privy examination of a married woman is not altogether ministerial in its character; it was designed to be a judicial act, or at least assimilated to a judicial act.

2. **SAME—CLERK'S DUTY IN PRIVY EXAMINATIONS.**—The clerk, in taking the privy examination, must not only be satisfied that she understands the nature of the act, but that she *fully* understands it, and as evidence that he has performed his duty, he must put on the back of the record, or annex to it, the prescribed certificate.

3. **SAME—SAME—ACTS CONTEMPORANEOUS.**—The privy examination and other certificate were designed by the act to be contemporaneous acts; and the execution of the deed to pass the married woman's estate and title, is imperfect and incomplete until the official act of the clerk, or other officer is made perfect and complete by meeting in letter and spirit every requirement of the statute, and if the clerk is stricken by paralysis or lightning, so as to be deprived of life or incapable of action before he makes his certificate, the failure to make it is not such an act as equity can relieve against.

4. **SAME—SAME—CONVEYANCE—WHAT NECESSARY TO COMPLETE.**—A conveyance by a married woman of her estate must be in strict accordance with the letter of the statute. The statute must be construed strictly, and the conveyance cannot be considered as the complete act of the wife until the certificate has been placed upon it.

**CASES CITED.**—1 Meigs' Dig., Sec. 1,071; Code, Secs. 20, 76, 2,042, 1,731-2, 2,063; Tyler on Inf. & Cor., 504; 2 Kent, 6 ed., 150 m. Code, p. 187, Art. III, Secs. 2,805, 3,319, 3,433, 4,052.

5. **SAME—SAME—JURISDICTION OF EQUITY.**—Wife cannot, by her own deed alone, pass her freehold estates, and it cannot be conveyed in any other mode than that prescribed by statute, and equity has no jurisdiction to treat, the neglect of the clerk to record the privy examination upon the deed, as an accident or mistake upon which relief can be obtained against a feme covert.

6. **SAME—SAME—FEME COVERT—NOT TO ACCOUNT FOR PURCHASE MONEY—WHEN.**—A married woman's separate estate will not be held responsible, nor will she be made to account for purchase money paid to her husband, when the conveyance has been defectively acknowledged, or the certificate of the clerk has not been annexed or attached to the deed; when, from the facts in the case, it appears that the married woman did not, in fact or in law, perpetrate a fraud, and where the purchase money was paid to her husband, without her authority, after she had avowed her purpose never to execute the deed, and where the parties had full knowledge that she was dissatisfied with the contract.

Difference in principles and facts decided in this case and the case of Pilcher & Catawals, Adm'r, vs. Smith and wife. 2 Head, 208, considered and pointed out.

7. **ARGUENDO—SAME—IN OTHER STATES AND AUTHORITIES.**—In other States it has been held that husband and wife cannot convey the wife's land by separate deeds; that she is not estopped by signing bond to convey; that a deed not duly acknowledged by her, conveys only the husband's use, and that the clerk's certificate must actually show that the deed has been explained to her, and that she was fully informed of her rights. See *Glidden v. S. Rupler*, 52 Penn. 400; *Baxter v. Bodkin*, 25 Ind. 172; *O'Ferrell v. Simplot Green* Iowa, 162; *Pease*

v. Barbreß, 10 Cal. 436; Garrett v. Moss, 22 Ill. 223; Elliott v. Pearce, 20 Ark., 508; Dewey v. Campan, 4 Mich., 465; Dalton v. Murphy, 30 Miss. (1 George) 59; Louder v. Blythe, 27 Penn. State R. 22; Ibid. 170; McCreary v. McCreary, 9 Rich. Eq. (S. C.) 84; Lelover v. Commercial Co., 7 Col. 266; also, Reed's Dom. Rel., 3 ed. 195, note 1, and Barrett v. Shackelford, 6 J. J., Mar. 532. So in this State it has been held that the wife cannot, by her own deed alone, pass her freehold estate, and that it cannot be conveyed in any other mode than that prescribed by statute. Cope v. Meeks, 3 Head, 387; Gillespie v. Warford, 2 Cold. 637; also Matherson v. Harris, 2 Cold., 443; Normant v. Wison, 5 Hum. 26; Perry v. Calhoun, 8 Hum. 554; Mountgomey v. Hobson, Meigs 437; Henderson v. Beerson, 1 Cold. 225; Mount v. Kesterson, 6 Cold. 463.

NELSON, J., DELIVERED THE OPINION OF THE COURT.

Rhea and wife, the complainants to the original bill, signed a title bond, bearing date 29th March, 1855, in which they agreed to convey the tract of land described therein, containing two hundred acres, more or less, on the payment of two notes executed by Iseley, the one for \$675, due Sept. 1, 1855, and the other for \$550, due March 15, 1857. An additional consideration of \$325 was paid by the sale and delivery of a horse and colt and other property, and a small sum in cash, so that the entire consideration for the tract of land was \$1,550. The amount of the notes was subsequently paid to said Rhea, but at what time does not clearly appear. On the 2d December, 1861, Rhea and wife signed a deed for the land, purporting to convey it in fee and with covenants of warranty to said Iseley; and the first question raised by the bill and cross-bills—the allegations of which it is not necessary to detail—is whether this deed for the land, belonging exclusively to the wife, was acknowledged by her, upon privy examination, in such manner as to make it binding upon her, or to entitle Iseley, in a court of equity, to relief?

Mrs. Rhea denies that she either executed or acknowledged the deed, freely and voluntarily, and the proof as to its acknowledgment is in substance as follows:

W. L. McKinley, formerly Deputy Clerk of the County Court of Meigs county, and also Clerk of the Circuit Court, testifies, in his deposition, that the deed was acknowledged before him as Acting Deputy Clerk of the County Court, by James Rhea and wife, on the 2d December, 1861; that he took the acknowledgment in the common form prescribed by law, the husband and wife both being present and making the same; that Mrs. Louisa J. Rhea then walked with the Deputy into his family room, where, in his own language, "he took her privy examination according to the requirements of the laws of Tennessee; that he did not enter her acknowledgment upon the deed; that the reason why he did not do so was that the number of acres was not expressed in the deed; that the clerk was then required by law to

collect a State and county tax, per acre, on conveyances in fee; that he advised Iseley, the vendee, to have another deed made, which he said he would do; and that he, the witness, therefore suspended the usual entries to be made upon the probate book and upon said deed, but noted in the margin of the deed the words, in pencil, '2d Dec., 1961,' and that he at all times remembered the transaction because, as he says, the duty of the clerk relative to the same had not been fully performed, and his memory was kept refreshed by conversations after he had gone out of office, and by letters addressed to him for the last two years in the State of Arkansas."

Upon this statement of the clerk, corroborated by other witnesses, and elaborated upon cross-examination, it is urged by Iseley's counsel that the privy examination of Mrs. Rhea was perfect and complete, and had the effect to divest the title; that the certificate of the clerk and the registration of the deed are intended only to furnish evidence as to the fact of the acknowledgment and to give notice; and that the omission of the clerk, who has gone out of office and cannot now perform the duty enjoined upon him by law to make the requisite certificate upon the deed, is such an accident as can be relieved against in a court of equity.

Without reviewing the statutes which were in force in North Carolina and Tennessee, prior to our present code, a clear and concise statement of which is contained in 1 Meigs' Dig., section 1,071, and observing, merely, that the common law mode of passing the estate in lands of a *feme covert* by fine and recovery, never was in use in either State, it will be sufficient to refer to the statute in force at the time when the alleged probate of the deed in controversy occurred. By the Code, Section 2,076, it is provided that "every deed or other instrument of writing executed by husband and wife, and acknowledged and proved and registered in the manner hereinafter prescribed, shall bind them, their heirs, or assigns. The officer or court before whom the execution of such deed or instrument is acknowledged or proved, shall examine the wife, privily and apart from her husband, touching her voluntary execution of the same and her knowledge of its contents and effects; and if she acknowledges, or states that she executed the same freely and voluntarily, and without any compulsion on the part of her husband, and the clerk or other officer is satisfied that she fully understands the same, he shall, in addition to the certificate or acknowledgment above described [in § 2,042] also put on the back of the deed, or annex to it, the following certificate:

'And —, wife of the said —, having appeared before me privately and apart from her husband, the said — acknowledged the execution of the said deed to have been done by her freely, voluntarily and understandingly, without compulsion or constraint from her said husband, and for the purposes therein expressed. Witness —, Clerk of said Court, at office, this — day of —, 18—.'

Sections 2,077 and 2,078 provide for the privy examination of the wife under a commission where she is unable, from sickness, or any other cause, to appear before the clerk; and Section 2,079 declares that the said commission, certificate of privy examination and probate, shall be registered with the deed in the county where the land lies." A fraudulent certificate of acknowledgment, and the false registration, etc., of a deed, are made felonies by Sections 4,731, 4,732; and in Section 2,032 it is enacted that "If a clerk omit any words in the certificate of a privy examination by him taken of a married woman, touching the execution of any deed or other instrument by her executed, he may at any time, on application of either of the parties interested, correct such error, mistake or omission, making oath, in open court, to the truth of such correction." It is further declared, in Section 2,803, that "the register shall record the correction in the proper book of his office, and make a reference to the same on the margin opposite the original register of the certificate."

It is apparent from these sections that it was the intention of the Legislature to make the execution of a deed by a married woman one of the most solemn acts known to the law. The policy of so making it has been recognized in the legislation of every State in the Union; and in England, fines and recoveries have been abolished by the statute of 3 & 4 William IV., C. 74, and the wife's real estate is now transferred, on a private examination, apart from her husband, in a mode very similar to that so generally adopted throughout the United States.—Tyler on Inf. & Cor. 504. At common law the existence of the wife was, during the marriage, and as to most purposes, regarded as merged in that of her husband, and she was and is still entirely incapable of making a contract, and any conveyance of hers, except by some matter of record, was and is absolutely void. "The disability of the wife to contract so as to bind herself—it has been well observed—arises not from want of discretion, but because she has entered into an indissoluble connexion by which she is placed under the power and protection of her husband, and because she has not the administration of property, and has given up to him all personal

property in possession, and the right to receive all such as may be reduced into possession."—2 Kent., 6th ed. 150 m. To a certain extent, not material here to be considered, this disability has been removed by the liberal and enlightened legislation of this State in the Code, p. 487, Art. III., and in Sections 2,805, 3,319, 3,433, 4,052, as well as other sections and subsequent statutes not here referred to. Aside from these statutory provisions, it has always been the policy of our State Legislature to place as many safeguards around the real estate of the wife as is consistent with the marital relation, the abolition of entails, and the migratory habits of our people. Real estate has been regarded as the surest means of support to the wife and her children; and, in view of the mutability of human affairs, the liability of the husband to become embarrassed in his speculations and dealings, and the danger to the wife of being left to dependent widowhood with a helpless family around her, the law has provided a means, too often illusory and ineffectual, of enabling her to guard against the almost resistless influence of her husband, as well as her own ignorance and inexperience in respect to legal transactions, by causing her to be examined apart from her husband as to her own voluntary action in parting with her real estate. It was not the intention of the statutes that this examination should be a mere formula without substance or meaning, nor is the action of the clerk, in taking her examination, altogether ministerial in its character. It was designed to be a judicial act, or at least assimilated to a judicial act, for it is not only provided that she shall state that she executed the deed freely, voluntarily and without compulsion on the part of her husband, but it is expressly enacted that the clerk or other officer shall be *satisfied that she fully understands the same*. This implies that the clerk or other officer is not simply to inquire whether she signed the deed freely and voluntarily, but that he shall fully explain to her the consequences of her act, or otherwise ascertain from her statement that she is fully advised of the fact that, by executing the deed, she will, in the absence of any equitable contract with her husband, forever deprive herself of her estate, without any claim whatever to the proceeds of its sale, and that such proceeds become the property of her husband and cease to be within her own control. The clerk or other officer is presumed to be a disinterested and impartial adviser or monitor. He is a sentinel placed by the law between the husband and the wife to guard her rights alike against fierce and insidious approaches. He is the only shield interposed between the weakness of the wife and the power

of the husband; or, to change the metaphor, the last barrier that may oppose the utter destruction of her only remaining right. If the clerk is satisfied that she has not the freedom of her own will, or has been ignorantly deluded into acquiescence and does not comprehend the nature of the act she is about to perform or complete, then he cannot, acting as he does under the obligation of an oath, truly certify that, in executing the deed, she has acted freely, voluntarily and without compulsion. He must be *satisfied* not merely that she understands the nature of the act, but that she *fully* understands it; and, as evidence that he has performed his duty, he must put on the back of the deed, or annex to it, the prescribed certificate. It is impossible, from the nature of the acts to be done by the married woman who acknowledges the deed, and the clerk who makes the privy examination and takes the acknowledgment, that the execution of the deed, so as to pass the title, can be considered perfect and complete until the official act of the clerk or other officer is made perfect and complete by meeting, in letter and spirit, every requirement of the statute. The clerk is not to make the certificate until after he is satisfied that the married woman fully understands the nature of the act; and how is it to be proven that he is so satisfied unless he certifies it in the precise manner directed? Although the statute does not in express terms declare it, it is manifest that the privy examination and the certificate were intended to be cotemporaneous acts. The statute makes no provision for the cases put in argument. If the clerk is stricken by paralysis, or with lightning, so as to be deprived of life or incapable of action before he makes his certificate, the failure to make it is not such an accident as equity can relieve against. The statute has made no exceptions and the courts can make none. No court can know otherwise, than from the certificate, that the clerk is *satisfied* that the act has been understandingly performed. Bystanders may be present and hear the examination, but no one other than the clerk can certify to the fact that he is *satisfied* with it. In the case under consideration it may be true, as stated by the clerk in one form of expression, that he "took the privy examination according to the requirements of the laws of Tennessee," or, in another, that "the deed was fully acknowledged by Rhea and wife, and the privy examination of Mrs. Rhea was fully and properly taken;" and yet, if a court of equity had the power to supply the certificate, or relieve the supposed accident, this evidence would be insufficient to authorize its active interposition, for the statement is defective in not showing that Mrs. Rhea acknowledged to the

clerk that the execution of the deed was done freely, voluntarily, etc., and contains, not a narration of the examination, but the clerk's opinion of its legal effect; and it may be observed further, that the clerk does not testify that he was satisfied she fully understood it. While there is ample evidence in the record to show that Mrs. Rhea is an intelligent woman, and fully capable of understanding the nature of the act alleged to have been done, this is not the kind of proof contemplated. Were witnesses permitted to express their opinion as to whether she acted knowingly, voluntarily and without coercion, it would open a boundless field of investigation, and substitute them as judges in place of the sworn officer of the law. The conveyance can be made alone in the mode directed by the statute, and cannot be considered as the complete act of the wife until the certificate has been placed upon it.

In other States where similar statutes prevail, it has been held, either with the peculiar language employed, or by judicial construction, that husband and wife cannot convey the wife's lands by separate deeds; that she is not estopped by signing a bond to convey; that a deed, not duly acknowledged by her, conveys only the husband's use, and that the clerk's certificate must actually show that the deed has been explained to her, and that she was fully informed of her rights. See *Glidden v. Strupler*, 52 Penn. 400; *Baxter v. Bodkin*, 25 Ind. 172; *O'Ferrell v. Simplot Green*, Iowa, 162; *Pease v. Barbress*, 10 Cal. 436; *Garrett v. Moss*, 22 Ill. 223; *Elliott v. Pearce*, 20 Ark. 508; *Dewey v. Campan*, 4 Mich. 565; *Dalton v. Murphy*, 30 Miss. (1 George) 59; *Louder v. Blythe*, 27 Penn. State R. 22; *Ibid.* 170; *McCreary v. McCreary*, 9 Rich. Eq. (S. C.) 84; *Lelover v. Commercial Co.*, 7 Col., 266. See also *Reeve's Dom. Rel.*, 3d ed. 195, note 1, and *Barrett v. Shackelford*, 6 J. J., Mar. 532.

So in this State it has been held, and we approve the decisions, that the wife cannot, by her own deed alone, pass her freehold estates, and that it cannot be conveyed in any other mode than that prescribed by statute. *Cope v. Meeks*, 3 Head, 387; *Gillespie v. Warford*, 2 Cold. 637. See also *Matherson v. Harris*, 2 Cold. 443; *Normant v. Wilson*, 5 Hum. 26; *Perry v. Calhoun*, 8 Hum., 554; *Montgomery v. Hobson*, Meigs 437; *Henderson v. Beeson*, 1 Cold. 225; *Mount v. Kesterson*, 6 Cold. 463. Declaring, as we do, that a court of equity has no jurisdiction to treat the neglect of the clerk to record the privy examination upon the deed as an accident or mistake upon which relief can be obtained against a *feme covert*, it may be observed that, if



any doubt existed on the subject, it clearly appears, from the clerk's evidence, that there was no accident or mistake, in point of fact, as he did not enter Mrs. Rhea's acknowledgment upon the deed for the reasons already stated, and especially that he advised Iseley, the vendee, to have another deed made, which he said he would do. It is manifest from the evidence that neither the clerk nor Iseley, the vendee, regarded the privy examination as complete; that Iseley did not intend to rely upon the deed, and that he cannot now claim, as an accident or mistake, the failure to certify the privy examination.

The Chancellor declared the deed from Rhea and wife null and void, but decreed that Mrs. Rhea should account for the purchase money; that Iseley should account for the rents and profits, but receive a credit for taxes paid by him, and also for permanent improvements, and that, if there should be a balance in his favor, the same should be a lien on the tract of land to be enforced, if necessary, by the order of the court.

So much of the decree as declares the deed void is warranted by the Code, § 2,481, which declares that "The interest of a husband in the real estate of his wife, acquired by her, either before or after marriage, by gift, devise, descent, or in any other mode, shall not be sold or disposed of by virtue of any judgment, decree or execution against him; nor shall the husband or wife be ejected from, or dispossessed of, such real estate of the wife by virtue of any such judgment, sentence or decree; nor shall the husband sell his wife's real estate, during her life, without her joining in the conveyance in the manner prescribed by law in which married women shall convey lands." But the question as to whether Mrs. Rhea shall account for the purchase money, is of more difficult solution.

It is insisted that by signing the title bond in the first instance and negotiating the contract with Iseley in person, as well as by claiming a horse and perhaps some of the other property delivered in part consideration for the land, Mrs. Rhea perpetrated such a fraud as makes it equitable that she should account for the purchase money. Rhea and wife are specially interrogated in Iseley's answer and cross-bill; and, in their separate answers, fully deny the fraud, and state, in substance, that in any conversations which she had with Isely preceding the execution of the title bond, she acted under the undue influence of her husband. The answers are not disproved in any material point, either by two witnesses, or by one with strong corroborating circumstances. There are statements, by separate witnesses, contradictory of

some of the allegations in the answers, which need not be here analyzed, as there is no proof that Mrs. Rhea ever appropriated to her separate use any of the property which, with a small amount in cash, amounted to the said sum of \$350; nor is there any evidence disproving the statement, in Rhea's answer, that the notes for the residue of the purchase money were made payable and actually paid to him alone. Her claim to and use of "the spotted horse" delivered on the day of the contract in 1855, about which so much is said in the record and in argument, neither proves that she negotiated the contract or practiced a fraud, and are consistent with her statements as to the undue influence of her husband, and that she ultimately signed the deed and went to acknowledge it under the threat of a lawsuit and in ignorance of her rights. But although these particular acts do not establish the charge of fraud, it is insisted that if a married woman covenants to convey land, and by reason of her coverture the covenant is void, it would be a fraud for her to avoid the contract without restoring the purchase money; and, in support of this position, Iseley's counsel rely upon *Pilder & Cataulis, Adm., v. Smith and wife*, 2 Head 203, and the authorities cited in that opinion.

The facts of that case, briefly stated, are that a free woman of color purchased a lot of ground from a married white woman, to whom, or to whose husband, as her agent, the purchase money was paid. It is intimated in the opinion that the husband was the real owner of the lot, and that it had been conveyed to the wife to protect it against his creditors. He executed a deed, but his wife refused to join him in it; and, after the purchaser had held possession nearly ten years, she caused a suit of ejectment to be brought for the lot. At the time of the original contract she had executed a covenant to convey, on the payment of the purchase money. On a bill filed to enjoin the action of ejectment, and for other and general relief the Chancellor refused a decree for specific performance, but decreed that the purchase money should be refunded with interest, and declared it a lien on the lot; and his decree was affirmed on the ground that the case, in the language of the court, "was an aggravated fraud against an innocent purchaser, whose *caste* and condition entitled her to expect the observance of good faith on the part of those who had dealings with her." 2 Head, 211.

It is manifest from the opinion in that case that the wife acted freely and voluntarily; that her husband, by executing a conveyance, was willing, so far as in his power, to complete the con-

*James C. Peasford.*

tract, but that she utterly refused, in the exercise of her own will, to join him in the deed, and determined to perpetrate, and did perpetrate, a gross fraud. But in the case at bar, it is clearly shown that Mrs. Rhea joined her husband in signing the title bond, and also in executing the deed, and, in doing so, may well be presumed to have acted under his influence and control, especially as no privy examination was taken in the mode prescribed by law to show that her acts were free and voluntary. She fully denies that she received, or authorized her husband to receive, any part of the consideration; and it is not shown that he acted as her agent in receiving the purchase money, or that she ever enjoyed any part of it, as before stated, to her separate use. On the contrary, a female witness, who resided in the family, proves that after the trade was made, and in the year 1835, Mrs. Rhea said to her husband and to Iseley, that she wished them to take the stock back and let her keep the land; that they desired her to make a deed for the land, and she then declared she never would make it.

Mrs. Rhea admits, in her answer, that she signed the title bond after long and persistent persuasion on the part of her husband and of Iseley, and after her husband had become much intoxicated from ardent spirits furnished him by Iseley, but declares that, in signing the bond, she acted "decidedly against her own will and wish." She also admits that she signed the deed, but states that, in doing so, she did not act freely, voluntarily and willingly, but acted under the undue influence of her husband, and the declaration of Iseley and her brother that they had been informed by lawyers that a Chancery Court, upon a bill filed for that purpose, would divest the title out of her and make her pay the costs, and the threat of Iseley that he would file such a bill. These statements are not disproved by the evidence of the single witness who staid all night at Rhea's, with Iseley, on the night before the title bond was signed, and who states that Iseley made the trade principally with Mrs. Rhea herself; nor are they disproved, as already remarked, by the evidence of other witnesses. They are corroborated, in part, by the statement of the witness that Rhea "set out some spirits at supper, that witness took a drink, that Iseley took some and Mr. Rhea took some, and also next morning we had a small dram apiece, and that was the end of it." They are also corroborated by other testimony to the effect that Rhea and wife were both in affluent circumstances at the time of their marriage; that he was a bad manager; that his habits were intemperate, and that he has run through the property."

But it would be useless further to detail the evidence, as we are satisfied, after a diligent examination of the whole case, that Mrs. Rhea did not, either in law or in fact, perpetrate a fraud, and should not be compelled to account for purchase money which never came to her hands, and was evidently paid to her husband without her authority, after she had distinctly avowed her purpose never to execute the deed, and with full knowledge that she was dissatisfied with the contract.

As all the parties are before this Court, the Chancellor's decree will be affirmed, with the following modifications:

1. Mrs. Rhea will not be held to account for any part of the purchase money.

2. Iseley will account to Mrs. Rhea for the rents and profits, with interest from the end of each year, and be credited for any permanent improvements actually enhancing the value of the land, but not to an amount greater than the rents and profits. He will also be credited with sums paid for taxes, with interest.

3. If the rents and profits exceed the taxes and improvements, the amount of the excess will be decreed to the separate use of Mrs. Rhea.

4. James Rhea will be charged, in favor of Iseley, with the amount of purchase money, \$1,550, and interest from the time it became due.

5. All the costs in this Court, and in the Court below, will be adjudged against Iseley, who will have a decree over against James Rhea.

6. The account will be taken by the Clerk of this Court, who may, if he shall deem it necessary, hear further proof as to the matters of account. He will report to the present term, if practicable, but if not, to the next.

J. T. HILLIS *v.* G. W. MARTIN *et al.*

Nashville.

**SALE OF LAND—DEFICIENCY IN QUANTITY—ABATEMENT IN PRICE FOR, NOT ALLOWED—WHEN—CHANCERY SALE.**—The purchaser of land at a Chancery sale bought by a plot giving the number of acres and boundaries; the number of acres given were 267 while in fact the lot contained only 224 acres, as was discovered by the purchaser about two years later. The Clerk, by order of Court, reported the land worth \$7 per acre as a minimum price, upon calculation based upon this price the purchaser bought. The mistake as to quantity was made by the surveyor, without fault of either commissioner or purchaser. *Held*, the purchaser is entitled to no reduction in price for such deficiency in quantity.

**CASES CITED.**—1 Story, Eq. 195, 4 Mason, 414; 5 Yerg., 471; 2 Sneed, 133.—  
ED.

NICHOLSON, C. J., DELIVERED THE OPINION OF THE COURT.

J. T. Hillis was a purchaser of one of the lots of the land of Wm. Martin, dec'd, sold by a decree of the Chancery Court of Warren county. Before the sale, an order of survey was made by the Court, and the county surveyor reported lot No. 3, according to its metes and bounds, stating the quantity at 269 acres.

The Court also ordered proof to be taken to ascertain the minimum price, per acre, of the land, and the report on the proof was \$7 per acre. The commissioner advertised the lands as lot No. 3, containing 267 acres, and at the sale read the advertisement and exhibited the plot of the surveyor on which the lot was set out by metes and bounds, with 267 acres written on the face as the number of acres it contained. But, in offering the land for sale, the bidding was not by the acre, but in gross for the tract. Hillis made a calculation as to what 267 acres would come to at \$7 per acre, and bid that amount in gross. The land was knocked down to him, he executed his notes accordingly, and the sale was afterwards reported to the Court and confirmed, and the title vested in Hillis. About two years afterward, when his second note was about due, Hillis ascertained, by another survey of the land, that instead of containing 267 acres, it contained 224 acres, showing a deficiency of 43 acres in the tract. He thereupon filed his bill for an abatement of the price of \$301, that being the amount of the deficiency in the quantity of the land at \$7 per acre.

There is no allegation that the commissioner or the owners of the land were guilty of any fraudulent misrepresentation as to the quantity of the lands, but the surveyor made a mistake in his calculations, and in that way the commissioner and the purchaser both assumed that the tract contained 267 acres. The Chancellor dismissed the bill, and complainant has appealed.

Mr. Story says it may be laid down as a general rule that when the sale is fair, and the parties are equally innocent, and the thing is sold in gross, by the quantity, by the estimate and not by measurement, a deficiency will not ordinarily entitle a party to relief, either by an allowance of the deficiency nor a rescision of the contract. Thus, for example, the sale of a farm by known boundaries, containing, by estimate, a certain number of acres, will bind both parties, whether the farm contains more or less.—1st Story, Eq., 195; 4 Mason, 414.

In the case of *Meek v. Bearden*, 5 Yerg., 471, the Court said: "Complainant has not alleged fraud, and has failed to make out any misrepresentations that influenced him in making the purchase, and this Court will not decree compensation for a deficiency in quantity, where in a case executory in the absence of fraud or misrepresentation, where the boundaries and outlines of a tract are given, and the means furnished of ascertaining a true quantity." The Court conclude: "We think that Meek has also all he intended to buy, and that induced him to give \$3,000, and that no one who has the precise thing expected and intended to be purchased, can have, in a Court of Equity, an abatement in the price. This is the plain principle of common sense, and needs not the support of authority."

In the case of *Horn v. Denton*, 2d Sneed, 133, it is said that the authorities sustain the position that when a private sale of land is made in gross, and not by the acre, a subsequent discovery that both parties were mistaken in their opinions will not avail to set aside the contract, unless the mistake was very gross, and that the same authorities place judicial sales, after confirmation, under very much the same rules, as to their binding effect, as private contracts. But in that case some of the parties were not *sui juris*, and for that reason it was made the exception to the general rule.

In the present case the application for abatement is made by the purchaser, after confirmation of the sale, and all the parties were *sui juris*. The decree of the Chancellor was, therefore, correct, and it is affirmed with costs.

**JOSEPH SAUDEK v. NASHVILLE AND HILLSBORO  
TURNPIKE CO.**

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**In Chancery at Nashville.—October Term, 1877,**

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CHANCERY JURISDICTION—ACT OF 1877.—A Court of Chancery will not entertain jurisdiction under the act of March 26, 1877, of a purely legal demand brought before it in the mode prescribed for the assertion of equitable rights.

CASES CITED.—2 Hum. 296; 3 Head, 703; Bacon v. Chas. M. S. at Knoxville.

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HON. WM. F. COOPER, CHANCELLOR.

On demurrer, the bill avers that the complainant is the owner of three notes of the defendant, each dated the 9th of May, 1876, and made payable to M. J. Crutcher, with whom he has since intermarried, at one, two and three years respectively, for \$764.78, with interest from date. The bill further states that the notes were given for borrowed money; that one of them is past due; that there is no property of the defendant of which the debt can be made except the defendant's road-bed, toll-gates, etc., and that the property cannot be touched without the aid of this Court. The bill prays that a decree be rendered in favor of complainant, against defendant, for the amount of the three notes, principal and interest, to be satisfied as they mature; that the turnpike, its road-bed, franchises and fixtures be sold to pay the notes, interest and costs; or, if complainant be not entitled to such relief, that the road be put in the hands of a receiver, and the tolls applied to the payment of the debt. There is also the usual general prayer.

The bill is, it will be noticed, a regular bill, in due form, according to the pleading and practice of this Court, asking for a decree for the amount of three notes, only one of which is due, and to subject to the satisfaction of the recovery the defendant's property, or the tolls derived therefrom. The defendant has demurred, assigning for cause that the bill shows no right on the part of the complainant, either legal or equitable, to subject the defendant's property to the payment of the complainant's claims. The bill contains no allegation that the defendant has done any act, or is in a condition which authorizes proceedings against it in a Court of Equity by a person who is not a judgment creditor. The demurrer is, therefore, obviously well taken so far as the complainant's rights rest upon equitable principles. Two of the notes are not yet due, and as to them the complainant has no legal right of action. His only right of action is on the note past due, and is strictly legal.

The very able and learned counsel of the complainant has frankly conceded that he has no equitable ground to stand on. He concedes, moreover, that his client has no right of action, either at law or in equity, upon any of his notes except the one past due at the filing of the bill, and that his right of action on this note is strictly legal. He bases his claim to a judgment on this note, in the present suit, upon the recent Act of the Legislature of the 26th of March, 1877, entitled an act to increase the jurisdiction of the Chancery Court. The bill, therefore, squarely presents the question whether a Court of Chancery will entertain jurisdiction, under this act, of a purely legal demand brought before it in the mode prescribed for the assertion of equitable rights.

The Act of the 26th of March, 1877, contains two sections as follows:

"1. That jurisdiction of all civil causes of action, now triable in the Circuit Court, except for injuries to person, property or character, involving unliquidated damages, are hereby conferred upon the Chancery Court, which shall have and exercise concurrent jurisdiction thereof along with the Circuit Court.

"2. That from and after the passage of this act, no demurrer for want of jurisdiction of the cause of action, shall be sustained in the Chancery Court, except in cases of unliquidated damages for injuries to person, property or character."

The theory of the learned counsel, upon which he rests his right to a judgment on the note past due, is that the intention of the Legislature, by this act, was to enlarge the equitable jurisdiction of this Court, so that a bill might be filed on any cause of action falling within the classes mentioned, and the rights of the parties determined under the forms, and by the law of courts of chancery. But the act under consideration does not, in terms, do anything of the kind. It does not purport to change the law by which the rights of parties are determined in the numerous classes of cases brought within the concurrent jurisdiction of the Circuit and Chancery Courts. It does not undertake to change the form in which the cases shall be brought into court, presented and tried. The theory relied on must, therefore, be deduced from the mere fact that the Chancery Court has been clothed by the act with concurrent jurisdiction over the causes of action enumerated. There are, beyond doubt, a large number of subjects over which equity is said to have concurrent jurisdiction with the courts of law, and this jurisdiction is exercised by equity in its own peculiar way. The causes of action under this



head are, however, strictly equitable, not legal, and are only acted upon by the courts of law as incidental to their own proper jurisdiction. *Sewanee Mining Company v. Best*, 3 Head, 703. The Legislature may also, no doubt, expressly confer upon either court the right to exercise jurisdiction in its own way over matters of the exclusive cognizance of the other court. But, ordinarily, the grant of concurrent jurisdiction over a class of litigation, previously the province of one court, implies the same forms and the same law. If the rights be legal, the remedies will be legal also. If equitable, equitable. Of this we have numerous instances. The County, Circuit and Chancery Courts have long had, by statute, concurrent jurisdiction over equitable rights, such as partition, sales of realty to pay debts, and recovery of legacies and distributive shares. They have also had concurrent jurisdiction over legal causes, such as motions for summary judgments of various kinds. In all of these cases, the form of administering rights, and the law by which they are determined, so far as the jurisdictions concur, are substantially the same in all of the courts: if legal, according to law; if equitable, according to equity. And it must be so in the very nature of things. For, otherwise, the jurisdiction would not be strictly concurrent, but different. A diversity, either in form or law, would lead to the strange anomaly of the judicial determination of the same right in one court one way, and in another court another way.

If the complainant in this case had brought an action at law upon the note now due, the defendant would have pleaded to the declaration at the return term of the writ, and the cause would not have stood for trial until the next term. The defendant might have plead as many, and as contradictory pleas as he saw proper, and not under oath. The suit having been brought in this court, under a statutory grant of concurrent jurisdiction without more, shall the defendant be deprived of his legal right to the delay of a term before trial? Can the complainant restrict the defendant to one plea, and demand that such plea, or an answer, shall be under oath? By what law shall the issues be tried, the law of the Circuit Court, or the law of the Chancery Court? Shall the law vary with the forum which the plaintiff may elect? The trial in one court is *viva voce*, in the other by deposition. The remedy for the correction of errors at law is by bill of exceptions, and an appeal in the nature of a writ of error, in which case the finding of the jury on the facts, or of the court sitting without a jury, is generally conclusive. *Bacon v. Chase*, M. S. Knoxville, September Term, 1877. The remedy in equity is by appeal or

writ of error, which takes up the whole case for trial *de novo*. The judgment at law would be a lien on realty from its rendition if affirmed on appeal, but the lien would be lost by an appeal in equity.

We are asked to bring about these radical changes and startling results, not by positive legislation, but by implication. Only the plainest expression of legislative will would, it seems to me, justify such sweeping innovations on the established order of judicial proceedings, and the mode of adjudicating rights.—*Shepard v. Johnson*, 2 Hum. 296.

I am clearly of the opinion that if the Court of Chancery has been constitutionally clothed with jurisdiction over the legal causes of action specified in the act, it must exercise that jurisdiction strictly in the mode prescribed by law for the commencement, prosecution, and trial of such rights in the Circuit Court, and by the same law. It cannot take cognizance of such causes as it does of those which fall within its jurisdiction proper. It will be time enough, when a legal cause is brought into this court and presented properly, to determine whether the act is constitutional. The demurrer must be sustained, and the bill dismissed with costs.

JOS. D. BENNETT AND WIFE *et al.*, v. JOHN C.  
COLDWELL.

Nashville. February 26, 1876.

1. ADMINISTRATOR'S SALE—WHEN VOID—PURCHASER'S RIGHTS UNDER.—In the case of a void sale by an administrator, the purchaser of land at such sale, belonging to the estate, will be substituted only to the rights of the creditors whose debts were paid by his money.

2. SAME—SAME—WASTE BY ADMINISTRATOR.—If the administrator has wasted the estate, he and the securities on his bond are liable to the creditors to the extent of the waste, and not the land of the heirs. This is so even if both the administrator and his securities are insolvent.

3. SAME—SAME—HEIRS NOT SECURITY.—The law does not make the heirs securities for the administrator, nor make their rights dependent upon the integrity or negligence of the administrator.

4. CASE CITED.—*Martin v. Turner*, 2 Heisk., 384, reviewed.

4. SAME—SAME—DOWER.—When the widow is the administratrix in such case, if she has not claimed any dower interest, and never had any set apart for her, the purchaser will not be entitled to relief out of the land to the extent of dower interest.

LEA, S. J., DELIVERED THE OPINION OF THE COURT.

John D. Johnson died in 1860, intestate, and at the August Term, 1860, of the County Court of Bedford, W. E. Johnson and Mary A. Johnson were appointed and qualified as administrator and administratrix of his estate. Sometime thereafter, W. E. Johnson, the administrator, died, and the administration of the estate then devolved upon Mary A. Johnson, the administratrix, who was the widow of the intestate. The said John D. Johnson left surviving him several children, his heirs at law, who are complainants in this bill. The said Johnson, at his death, had a large personal estate, and was the owner of a house and lot in the town of Shelbyville. On the 23d day of April, 1863, Mary A. Johnson, the administratrix, sold the house and lot to the defendant, John C. Coldwell, for \$4,400 in Confederate Treasury notes, and executed a bond to procure title, to be made to Coldwell, by the County Court of Bedford county, which has never been done. The heirs of John D. Johnson file their bill, in April, 1870, to set aside this sale as void, to put them in possession, and for an account for rents. To this bill defendant, Coldwell, files a demurrer, which being overruled, he files an answer in the nature of a cross-bill, making the complainants in the original bill, and Mary A. Johnson, defendants, in which the sale of the house and lot, by Mrs. Johnson, is admitted; but he alleges that one Cummings had an account against the estate of John D. Johnson, upon which suit had been brought in the Circuit Court of Bedford county for about \$3,200, and that, upon the

sale of the property by Mrs. Johnson, she paid off this indebtedness of her husband's estate with the proceeds arising therefrom, and with the balance paid other debts of the estate, and therefore he asks that, if the sale cannot be confirmed by the Court as manifestly for the interest of the heirs, that the Court will decree to him the amount of the purchase money and interest, and that the same shall be a lien upon the said house and lot. And he alleges further that he is entitled, by reason of his purchase, to at least the dower interest of Mrs. Johnson.

The defendants in the cross-bill answer, denying that any part of the \$1,400, paid by Coldwell, was used in the payment of the debts of Johnson's estate, and denying that Coldwell had any interest in the house and lot by reason of dower, Mrs. Johnson stating that she had never asked or claimed dower, nor had any ever been set apart to her. Proof was taken, and the cause was heard.

The Chancellor decreed that Coldwell, the complainant in the cross-bill, was entitled to a decree for so much of the purchase money as was used in the payment of the debts of the estate of John D. Johnson, and that the same was a lien upon the house and lot, and that the same should be sold to satisfy said decree.

In the settlement of Mrs. Johnson, as administratrix of her husband's estate, a copy of which is exhibited in the cross-bill, she charges herself with the sum of \$14,667.28, money received by her as administratrix, in which is included the sum of \$4,400, amount of sale of house and lot, and she credits herself with the sum of \$10,570.20, leaving a balance of \$4,097.98. She is afterwards credited with the sum of \$2,050.54, cash paid for family expenses and for a piano, leaving a balance in her hands of \$2,046.54. In the settlement she is also charged with notes therein set forth, belonging to said estate, amounting to the sum of \$7,025.25, which she states are all at interest, and will be accounted for when collected. It is also stated in her settlement that W. E. Johnson, the administrator, had collected a sum of money, amount not stated, for which he had never accounted. It is thus shown that there are personal assets belonging to said estate, amounting to upwards of \$9,000, after payment of all the debts which she reports against the estate. In her answer to the cross-bill, she states she sold the house and lot, not for the purpose of getting money to pay the debts of the estate; and, to prove the truth of that statement, she says: "And she was also offered, a few days before said sale, by M. M. McClure, the amount of a note he was owing said estate, which now amounts

to near four thousand dollars, and which she, by said failure to collect, has lost the entire amount to the estate of her deceased husband."

It is clearly shown that there are assets in the hands of the administratrix, more than sufficient to pay any claims which may be due Coldwell by reason of said purchase, or the same has been wasted by her mismanagement. If the purchase money for the house and lot was used in the payment of the debts of Cummings and others against the estate, the purchaser—the sale being void—is only entitled to be substituted to the rights of the creditors whose debts were paid by his money. The creditors of the estate have no right to a sale of land belonging to the heirs until the personal property is exhausted. If the estate has been wasted and destroyed by the administratrix, she, and the securities upon her bond, are liable to the creditors to the extent of the waste, and not the land of the heirs. If the administratrix has wasted the estate, and both she and her securities upon her administration bond are insolvent, the land of the heir cannot be made liable. The loss, in such a case, must fall upon the creditor. The law does not make the heirs securities for the administratrix, nor make their rights dependent upon the integrity or negligence of the administrator. Hence we are of opinion that the decree of the Chancellor, declaring a lien and ordering a sale of the house and lot, was erroneous. The sale was unquestionably void, for the administratrix had no power to sell the house and lot which had descended to the heirs. To support the views of the Chancellor, we are referred to an opinion of this court in the case of John W. Martin et al. v. H. L. Turner, 2 Heisk., 384. In that case, it is true the Court ordered a sale of real estate to repay the purchase money paid at a void sale, but there the Clerk had made a settlement with the administrators, and reported to the Court that there had come into their hands \$3,128, and that they had paid out \$4,441, leaving the estate indebted to them \$1,312, which report was confirmed by the Court. There was then a necessity for the sale, the personal estate being exhausted, and an outstanding indebtedness of \$1,312. But it is insisted that this case is analagous to the cases of verbal sales of real estate, where specific performance being sought by the vendee, who has been put in possession, and resisted by the vendor, or his heir, on the ground that the sale is void under the statute of frauds. In such cases, upon the clearest principles of equity, the vendee is entitled to a decree for the purchase money paid, and it is declared a lien on the land of the vendor. But

we cannot see wherein such cases have any analogy to this case. Here the vendor did not sell her own land, but land which belonged to other parties, and without their consent, for the heirs were all minors at the date of the sale. And the purchaser, at the time of the sale, well knew the house and lot was not the property of his vendor, but belonged to the heirs of Johnson.

But it is further insisted by the purchaser that he is at least entitled to the dower interest of Mrs. Johnson in said house and lot. No dower has ever been claimed or applied for by her, nor has any ever been set apart to her. Was any estate in land cast upon her by law at the death of her husband? None. The lands descended directly to the heirs. It is true the law gives her a right of dower in the lands, but she has never claimed, nor, as before stated, has any ever been assigned her. Besides, this contract exhibited is not an executed but an executory contract: she was to procure the County Court of Bedford county to divest and vest the title. We are therefore of the opinion that the defendant, Coldwell, is not entitled to any dower interest in said house and lot against the heirs. The decree of the Chancellor is reversed.

The cross-bill is dismissed, the sale declared void, the heirs entitled to possession, and the cause remanded for an account. The purchaser, Coldwell, will be charged with reasonable and proper rents since he went into possession, and be credited with the value of improvements to the extent they have enhanced the value of the house and lot, and with the amount of taxes paid thereon, but not in excess of the rents. The cost of this Court and the Court below will be paid by the defendant, Coldwell, except the costs incident to the taking of the depositions of witnesses to prove the general character of Mrs. Johnson and her sons, which will be paid by the complainants in the original bill.

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NEW SERIES.

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*DECISIONS OF THE SUPREME COURT,*

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VOL. I. NASHVILLE, TENN., FEBRUARY, 1878. No. 10.

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THOMAS AND MARY SHIELDS *v.* HANNAH THOMPSON.

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Nashville, December Term, 1874.

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1. SALE OF LAND—DEFICIENCY IN QUANTITY—ABATEMENT IN PRICE FOR—WHEN. A lot represented to the purchaser as fronting sixty-two feet on High street, and running back one hundred and seventy feet to an alley, in Nashville Tenn., was sold for \$12,815 in gross. Before confirmation of the sale the purchaser applied for relief, on account of a deficiency in quantity of two feet front.

*Held*, the purchaser is entitled to no relief.

CASES CITED.—1 Story Eq. Jur., Sec. 144; Meek *v.* Bearden, 5 Yerg., 467; Horn *v.* Denton, 2 Sneed, 125.

2. SAME—SAME—RENTS. The purchaser was entitled to possession from confirmation, and as possession was not obtained, he may recover rents from that time.

M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

Under a decree in this cause, a house and lot in the city of Nashville was sold by the Master, and purchased by C. P. Thompson. Before confirmation he applied by petition to have an abatement of the price, on account of the deficiency in the quantity of land. This relief was granted him, and the parties interested have appealed; the grounds for the relief, as stated in the petition of the purchaser are, that the advertisements of the property in the city papers and elsewhere stated that the property fronted *sixty-two feet* on High street, and the same statement was made by the auctioneer at the sale; that he bought with a definite understanding that there was a frontage of that much ground, and was influenced by this consideration in bidding the price he did; that he made a careful calculation of the same upon that basis; that the land constituted the principal value, as the houses were not comparatively valuable; that it turned out there was only a front of sixty feet, being a deficiency of two feet.

The advertisement referred to describes the property as that desirable property on "High street, near the corner of Cedar, known as the Shields property. The lot fronts 62 feet, and runs back 170 feet to an alley." Then follows a description of the houses and the terms of the sale: "Persons wishing to examine the premises are referred to certain real estate agents."

It fully appears that the sale was not by the foot, but in gross, the auctioneer, however, repeating the description contained in the advertisement as to the sixty-two feet front. The property sold for \$12,815.00. It turns out, upon actual measurement, that the front on High street is one foot and nine inches less than sixty-two feet. Does this make a case for relief? When the sale of land is by the acre or foot, the purchaser, of course, is only required to pay for the amount of land he received at the price bid. So also if the sale be in gross, and the purchaser buy upon the fraudulent representations of the vendor as to the quantity, or the mistake as to the quantity be so gross as to raise a presumption of fraud, relief may be had. It is clear, however, that this case does not come within either of these sales. The sale was not by the foot, but in gross. The representation as to the quantity was not fraudulently made, and the mistake as to the quantity was not so great as to raise a presumption of fraud. But it is argued that the relief should be granted upon the ground that the parties acted under a mutual mistake in regard to a material fact, touching the subject matter of the contract. This is



certainly a good ground for relief in equity. This principle, as applicable to sales of land, may be illustrated in this way: If the purchaser thought he had purchased a particular piece of land as a part of a farm, and material to its value, and the vendor thought he had sold it, when, in fact, the piece in question did not belong to the farm, or pass by the sale, this would be a clear case of a mutual mistake as to the land sold, and would be ground for relief. See 1 Story, Eq. Jur., Sec. 144.

But where the land sold is correctly described by metes and bounds, or its boundaries known, and a personal examination had, then a mere mistake as to quantity of land embraced within the boundary will be no ground for relief in the absence of fraud or misrepresentation, unless, perhaps, the mistake be so great as to raise a presumption of fraud, or shock the conscience of the Court. As, for instance, if the land be on an island in the river, the boundaries of which are clearly in view of the parties, and the lines correctly described, the vendor may represent, and both parties believe, that it contains one hundred acres. It would be no ground for relief to either party if it should turn out to contain a few acres more or less, although the difference be material to the price. The reason is, that the parties were not mistaken in regard to the land sold and bought, the particular price contracted about, and amount of it passed by the acre, the purchaser gets, or thought he was getting; but the parties were simply mistaken as to the number of acres which were embraced within the area, a matter to be ascertained by measurement and calculation—a fact about which one party was as well informed as the other, and about which either might have satisfied himself. Such is the doctrine laid down by the Court in *Meek v. Bearden*, 5 Yerg., 467, and which we think has not been departed from, but on the contrary, has been followed at the present term in the case of *Hides v. Martin*. This principle was not decided in *Horn v. Denton*, 2 Sneed, but the decision in that case placed upon a different ground altogether. We have but to apply the principle to the present case.

The property sold was a lot with a residence upon it, in the city of Nashville, the locality of which was correctly given, with such description that it could readily be seen and identified. It is not insisted that there was any mistake as to the boundaries of the lot, or as to any particular piece of land supposed to be embraced within it. It is not averred that there was any mistake as to the locality of the corners of the lot on High street, or of the lines running back from High street, but simply that the pur-

chaser believed, upon the statements in the advertisements and of the auctioneer, that the distance between those corners and lines was sixty-two feet—thus making the front sixty-two feet—whereas the distance was one foot and nine inches less, if the purchaser was not mistaken as to the locality of these corners. He could, with great care, have ascertained the exact distance by simple measurement, if he had so desired. Not having done so, and having purchased the property for a gross sum, he can have no relief. Nor could the other party have been entitled to relief if the front had turned out to be a foot or two more than sixty-two feet. The decree on this point will be reversed and the relief refused. The decree as to the rents was proper. The purchaser was entitled to possession from confirmation, and as possession was not obtained, he was entitled to rents from that time.

Decree accordingly divides the costs of this Court.

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PARILEE WILLIAMS, *by next friend*, L. S. WOODS,  
v. J. B. WILLIAMS AND J. M. SEALS.

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Jackson, May 14, 1874.

1. HOMESTEAD—CONVEYANCE, WITHOUT WIFE'S CONSENT—TITLE VOID—REMEDY. Where the wife does not join in a conveyance of the homestead, such conveyance is absolutely void, so far as it abridges her homestead rights, and she may, by next friend, file a bill *quia timet* to have the cloud removed, and her homestead rights declared, though she has never parted with the possession or occupancy.

Code, § 2114 (a)—ED.

*1 Seal 4.*

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NICHOLSON, C. J., DELIVERED THE OPINION OF THE COURT.

J. B. Williams being the owner in fee of a small tract of land in Henderson county, which, with the improvements thereon, was, worth less than \$1,000, on the 28th of December, 1872, sold and conveyed the same to John M. Seals, and executed to him a deed in fee simple, with covenants of seizin and of general warranty. In this conveyance, complainant Parilee, who is the wife of said

J. B. Williams, did not join. By her next friend she files her bill, alleging these facts, and also that this tract of land is all the real property owned by her husband or herself, and that at the time of the conveyance her husband and herself were in the actual possession of the land as their homestead, and that they still continue in possession thereof; but that the deed so made by her husband, without her joining therein, constitutes a cloud upon her rights, under the homestead law; and she prays that the cloud be removed, and her rights declared and protected. The bill was filed against J. B. Williams and J. M. Seals, as to both of whom the bill was taken for confessed. Upon the hearing, Chancellor Nixon dismissed the bill, and complainant has appealed.

The Constitution secures a homestead in the possession of each head of a family, and the improvements thereon, to the value in all of one thousand dollars, and exempts the same from sale under legal process during the life of such head of a family. The plain intention of this provision is, not merely to protect the husband, as the head of the family, in the possession and enjoyment of the homestead, but the protection of the interests of the wife and of the minor children, constituted a leading consideration for the adoption of the provision. This fact is apparent by the prohibition against the alienation of the property, without the joint consent of husband and wife, when that relation exists. To give complete protection to the wife and children, the homestead is not only exempt from the reach of creditors of the husband, but he is deprived of the power to defeat the enjoyment of the homestead by his wife and children, by selling and conveying it, except by deed in which she joins. And the Legislature, in giving legislative effect to these provisions, requires that the conveyance shall be regulated by the laws, as to the conveyance of land by married women; that is, the conveyance can be effective only upon the privy examination of the wife. Code, Sec. 2,114, (a).

It is manifest from these Constitutional and Legislative provisions, that while possession of the homestead is the essential feature in the exemption from sale under legal process, or by the deed of the husband, the wife is recognized as having a present, subsisting and continuing interest in the maintenance and preservation of the benefits of this possession, and that she has such a right in the land connected with the right of possession, that when that right is violated she is entitled to claim the protection of the Courts.

In the present case the husband has undertaken in contra-

vention of the express prohibition of the Constitution and Statute law, to convey the entire title of the homestead tract, without the consent, and against the will of his wife. It is now a rule of property, made permanent by the fundamental law, that every head of a family is deprived of the right to alienate the homestead, unless his wife joins in the conveyance. It follows that such conveyance is absolutely void, and communicates no title to the purchaser, so far as it abridges or interferes with the wife's homestead right. And the wife, by her next friend, has such an interest in the preservation of the homestead as entitles her to invoke the protection of a Court of Chancery, by bill *quia timet*, to have the cloud upon her rights removed, and her homestead rights declared.

The decree of the Chancellor will be reversed, with costs, and a decree rendered here in accordance with this opinion.

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RICHERTS, *by next friend*, v. EBLIN *and others*.

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Jackson, May 19th, 1877.

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INFANCY—SALE OF LAND—INNOCENT PURCHASER—BURDEN OF PROOF—ESTOPPED.—A bill to confirm the sale of an infant's land must allege that it is to the minor's interest to confirm the sale. In the defence of innocent purchaser the burden is upon defendant to make it out by proof, and he must show that he paid the purchase-money before notice of complainant's claim. Complainant is not estopped by the admission that while an infant she knew of the proposed sale to a third party, though she did not inform the purchaser of an intention to disaffirm.

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M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

Ida Richerts being at the time an infant married woman, with her husband, James Richerts, executed a deed conveying a lot, in Memphis, to James Eblin. Subsequently, Eblin filed a bill in the Chancery Court, at Memphis, setting forth the fact and charging that Richerts and wife were willing to confirm the sale. Process was served, and an answer filed by an attorney, admitting the

facts, upon which a decree was rendered confirming the sale, and the decree was registered. At the date of this decree Ida Richerts was still an infant and a married woman. She attained her majority on the 22d of February, 1870. After this, on the 14th of May, 1870, Eblin conveyed the property to Milly Slaughter. On September 13th, 1870, the present bill was filed, charging that the decree referred to confirming the sale should be reviewed and reversed, that the answer filed on behalf of complainant and her husband was filed by an attorney without any authority and without being appointed by the Court to defend for said minor, and the answer was not sworn to, and that upon the face of the record the decree is erroneous and should be reversed. The bill prays to recover the property from Milly Slaughter.

The bill was answered by Eblin, who also filed his answer as a cross-bill, and Milly Slaughter filed a plea and answer. The Chancellor gave complainant a decree for the property, upon condition she refunded the purchase-money and interest; and defendants appealed.

*Abstract of Opinion.*—The decree confirming the sale is not binding upon complainant. The bill did not make a case to confirm the sale of an infant's land. It did not allege that it was to her interest to confirm the sale, but only that a fair price had been paid, and that Mrs. Richerts and her husband were willing to confirm the sale, she being still a minor. Besides, the answer was filed without authority.

The defence of innocent purchaser set up by Milly Slaughter can not prevail, because there is no proof to sustain it. The burden is upon the defendant setting up this defence to make it out by proof. There is no proof of the payment of the purchase-money by Milly Slaughter to Eblin before they had notice of complainant's claim.

Nor is complainant estopped to set up her title. She admits in her deposition that she knew, before Eblin sold to Milly Slaughter, that she was going to buy it. It is upon this admission and her failure to disaffirm sooner that the estoppel is claimed. She was entitled to a reasonable time after attaining her majority and becoming discoverable to disaffirm her deed. *Scott v. Buchanan*, 11 Hum., 465; 2 Cold., 443. Her failure to inform the proposed purchaser of her purpose to disaffirm can not estop her, as it does not appear the time had arrived for her to act; besides, estoppels operate on the principal of constructive fraud. *Story Eq.*, § 391. And there is not sufficient evidence

that the conduct of Mrs. Richerts operated as a fraud upon Milly Slaughter.

Complainant does not object to the decree requiring her to refund the purchase-money. It is argued that she should be required to account for the improvements, but there is no distinct allegation or claim as to improvements, only a general allegation. On the other hand, the defendants are not required to account for rents, and we will not therefore disturb the decree.

The Chancellor directed that unless complainant refunded the purchase-money in a given time, the bill should stand dismissed and the title confirmed in defendants. This should be so modified as to allow the property to be sold in the event the purchase-money is not refunded, and the purchase-money paid out of the proceeds, giving the balance to complainant. The costs of this Court must be paid by defendants; the costs of the Court below divided, as directed by the Chancellor.—*L. and E. Reporter.*

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## JACKSON HUBBARD, *Ex'r.*, v. W. J. EPPS, *et al.*

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Jackson, April Term, 1876.

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1. **INSOLVENT ESTATE—STATUTE OF LIMITATIONS.** The statute of three years will be effective, as to parties who fail to file their petition within the proper time; notwithstanding the pendency of an attachment bill in their favor, at the time proceedings were begun to administer the estate as an insolvent estate. The attachment bill was not a suit against the administrator. It could at most have given a right to satisfaction out of the land attached, but the petitioners failed to prosecute their attachment bill to a decree, or to ask for any relief in the other case in the time limited. The filing of the insolvent bill did not of itself destroy or defeat the rights acquired by the attaching creditor, but the creditor lost his right to come in as a party to the insolvent bill by failing to come in within the proper time.

**CASES CITED.**—*Martin v. Blakemore*, 5 Helsk., 50; Statute of Limitations of three years.

2. **SAME—SAME—DEVISEES.** It is argued that the statute of three years is not available to protect the devisees of the realty; that this statute only protects the

personal representative But the plea of the personal representative is effectual, whether satisfaction is sought out of the personalty or realty.

3. SAME—SAME—TRUST IN FAVOR OF CREDITORS. Where a testator directs that certain property be sold for the payment of debts, this does not create such a trust in favor of any particular creditor as will affect the statutory bar.—Ed.

CASE CITED.—*Mitchell v. Calloway*, MSS.

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M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

The estate of Mrs. Martha B. Epps, in Tennessee, was being administered as an insolvent estate, under the bill filed for that purpose by her personal representative, when A. C. Page and others filed their petition, setting up a claim against the estate, and asking to be made parties. The Chancellor rejected the claim, and the petitioners have appealed. The bill was filed the 18th of June, 1868, and the petition of Page June, 1872; so the claim was barred by the statute of three years, (Page being a non-resident), unless this result is saved upon the following ground: Pages, in their petition, show that before the qualification of a personal representative in Tennessee, in July, 1867, they filed an attachment bill in the Chancery Court at Memphis, asking for and obtaining an attachment under the provision of the law allowing the process "where any person, liable for any debt or demand, residing out of the State, dies, leaving property in the State." It being alleged that Mrs. Epps resided in Virginia, and had died, leaving lands in Shelby and Madison counties, in this State. These lands were attached accordingly, but the cause does not appear to have been prosecuted to judgment. These facts are stated in the petition, and it is assumed that a lien was acquired on the lands; but petitioners express their willingness to share *pro rata* with the other creditors, and not insist upon priority.

Do these facts save the bar of the statute? It may be conceded that, under our attachment laws, the bill was properly filed, and a lien acquired upon the land attached, which would have been effectual by prosecuting the case to a decree, but which would be lost if the cause be abandoned or successfully defended. Upon the filing, by the executor of the insolvent bill, the Chancellor might have enjoined the prosecution of the attachment bill, or have permitted it to proceed to a decree, but it does not appear any order was made in regard to it. The suggestion of insolvency alone in the County Court, and advertisement operated as an injunction against bringing suits, but allowed suits already brought to proceed to judgment, to be certified to the County

Court. The petitioners, after the filing of the insolvent bill, might have come in under the same rule applicable to other creditors, either to claim a *pro rata*, or to claim priority under their attachment, a question to be determined in the insolvent case. This, either before or after a decree in the attachment case; but the question is, should they have come in within the time limited by the statute of limitations? Does the fact that the petitioners had the attachment bill pending, give them any longer time in which to appear in the insolvent proceedings?

Notwithstanding the pendency of the attachment bill, we hold that they should have presented themselves within the time limited, if they desired to become parties to the insolvent bill. We think this question is decided in *Martin v. Blakemore*, 5 Heisk., 50.

The attachment bill was not a suit against the administrator. It could at most have given a right to satisfaction out of the land attached, but the petitioners failed to prosecute their attachment bill to a decree, or to ask for any relief in the other case in the time limited. The filing of the insolvent bill did not of itself destroy or defeat the rights acquired by the attaching creditor, but the creditor lost his right to come in as a party to the insolvent bill by failing to come in within the proper time.

It is argued that the statute of three years is not available to protect the devisees of the realty; that this statute only protects the personal representative. But we think the plea of the personal representative is effectual, whether satisfaction is sought out of the personalty or realty.

It is next argued that as the will of Mrs. Epps directs that her lands in Madison county be sold for the payment of debts, that this creates a trust in favor of creditors, and that the statute of three years does not apply so far as to protect this land. We think no specific trust was created in favor of any particular creditor. The will only designated certain property to be applied to debts; the law makes all the liability. But the estate is protected against all demands not made within the time, as much as if the debts were a charge upon the entire estate, under the law. We do not understand the decisions of this Court to be opposed to this view.

There is a remark, apparently to this effect, in the opinion in the case decided at the last term, of *Mitchell v. Calloway*. The question in the case, however, was, whether Calloway, the administrator of Mitchell, and who claimed a debt due him from the estate was barred, because he had not retained his debt out of the assets in his hands within the time. It was held that he had



no legal assets in his hands, and that his failure to retain his debt out of the equitable assets did not bar him. It was upon this ground the case was decided. It would require very strong authority to induce us to hold that where a testator directs his debts to be paid, and designates a certain part of his property to be thus applied, that the statute of limitations intended to protect his estate against fraudulent claims is thereby abrogated, and that all debts may come in without limit of time. The trust thus imposed upon the executor with respect to the property thus devised, is not materially different from the trust which the law imposes upon him, to apply the personal assets to the payment of the debts, and there can be no good reason why the statute should not apply in the one case as in the other. It is for the protection of the estate in either case.

Perry, in his work on Trusts, says: "In the United States both the real and personal property are liable for the debts of a deceased person, and no valid trust can be created by will for the payment of debts, in either personal or real estate. The statute of the several States point out how estates shall be administered for the payment of debts." \* \* \* \* And he concludes: "The claims of a creditor against the estate of a deceased person will be barred by the statute of limitations, notwithstanding certain property is given in trust or charged with the payment of such claim." The only qualification of this doctrine is where the creditors assent to the trust, and the executor settles the estate accordingly; then the executor becomes a trustee for the creditors, who are estopped from insisting upon a legal settlement. Various authorities are cited by the author, and we do not doubt the conclusion.

This record presents an anomaly to which we will refer. Mrs. Epps resided in Virginia, and leaving a large estate both in Virginia and North Carolina, and also lands in Tennessee. So far as we see, the creditors, who are parties in the present case, are residents of Virginia. If there were creditors in this State our Courts would distribute the assets here among such creditors, and would not transmit the assets to Virginia, and leave our domestic creditors to go there for satisfaction. But as the creditors seem to be all of Virginia, and an administration pending there, we do not know that it is the proper course to distribute the assets here among such of the Virginia creditors as choose to come, or whether the proper course would be to transmit the assets to the general administrator. This question has not been made, and we refer to it for the purpose of saying that it is not to be under-

stood as decided. The only question we have been called upon to decide upon the appeal of Page is, whether he presented his claim in time.

Affirm the decree, with costs.

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## THE STATE *v.* J. M. JOHNSON.

Nashville December Term, 1877.

1. CRIMINAL LAW—BIGAMY, AN ATTEMPT TO COMMIT—INDICTABLE. Where a party attempts to commit bigamy, this is such an offence as is indictable under Section 4630 of the Code.

CASES CITED.—1 Bish. Crim. Law, § 365-6 and § 689; 1 Rus. on Cr. 46-7; Jones *v.* The State; Quarles' Digest, 61; Constitution, ch. 8, Art. 1; Code, Sec. 4630.

2. ARGUENDO—SAME—OFFENCES AGAINST THE PERSON. Such crimes as are injurious to the person, as contra-distinguished from property, are offences against the person.—Ed.

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DEADERICK, C. J., DELIVERED THE OPINION OF THE COURT.

The defendant was indicted in the Circuit Court of Franklin County, for an attempt to commit bigamy. The indictment was, upon defendant's motion, quashed, and the State appealed.

The indictment is founded upon section 4630 of the Code, which provides, "if any person assault another with intent to commit, or otherwise attempt to commit any felony or crime, punished by imprisonment in the penitentiary; where the punishment is not otherwise prescribed, he shall, on conviction, be punished by imprisonment" in the penitentiary, not exceeding five years, or by imprisonment in the County Jail, not more than one year, and by fine etc., at the discretion of the jury.

The indictment charges that defendant, having a living wife, procured the consent of one Josephine Woods to marry him, and obtained license for the marriage and a minister of the gospel to perform the ceremony; and taking his licence and accompanied by the minister, he went to the house of the father of said Josephine, where she resided with the intent to marry said Jose-

phine, and then it is charged that by the means and in the manner aforesaid defendant did unlawfully and feloniously attempt to commit the crime of bigamy, etc.

In the case of *Jones v. The State*, Quarles Digest, 61 which was a conviction under section 4630 of the Code, for attempting to steal. Judge Nicholson construed the section as applying only to offences against the person, and not to offences against property.

This construction derived strong support, in his opinion, from the fact that the chapter and article in which the section in question was found was "devoted to crimes against the person."

Bigamy is classed as a crime against "public morality and decency"—Code, ch. 8, art. 1. Yet it may well be said to be a very great crime against the female who is the subject of the imposition and deceit, so all criminal acts are offences against the public or the State, and such of them as are injurious to the person, as contradistinguished from property, are also offences against the person.

To constitute an attempt to commit a crime, an intent to commit it must exist, simultaneously with some act done in furtherance of the intent, and with the purpose of consummating the contemplated crime.—1 Bish. Cr. L. § 365-6; 1 Russ. on Cr. 46.

So it is said, in 1 Bish., Cr. L., § 689, that to incite a servant to steal his master's goods, and to make overtures to one to commit adultery, where it is a statutory felony, is an attempt to commit a felony, and such acts are indictable misdemeanors, though the person approached declines to comply; and in § 690, it is said, in Connecticut, where adultery is a felony, an unsuccessful solicitation to commit it is an indictable attempt.—See also 1 Russ. on Cr., 46-7.

In this case there was not only solicitation to the bigamous marriage, but upon the consent of the female being obtained, other and further preparations were made, in the procuring the marriage license from the proper officer, and obtaining a minister to solemnize the marriage, and going to the house of the confiding woman for the purpose of effecting and accomplishing the criminal purpose, in company with the minister, when, by some developments, the woman was saved from the terrible consequences of this atrocious and deliberately-planned outrage.

We are of opinion, therefore, that the offense contemplated was one covered by Sec. 4,630 of the Code, and that if bare solici-

itation to commit adultery is, in law, an attempt to commit that offence, so the facts alleged in this case make a case of an attempt to commit bigamy.

Reverse the judgment, and remand the cause for trial.

M. J. CARTER, *by next friend* v. JOHN S. HATTAN, *et als*.

Knoxville, November 27, 1875.

1. HOMESTEAD—CANNOT BE ALIENATED, THOUGH THE SALE BE FOR FULL VALUE IN MONEY OR REAL ESTATE—WHEN. Where a wife has not consented, by conveyance as required by law for married women, the homestead can not be alienated, though the sale be for full value in money, real estate, or other things; this rule obtains as to the right of homestead only; the fee remains qualified by the right of occupancy, which can not be disturbed, while the relation supporting the right of homestead exists.

Constitution, Art. 11, Sec. 11; Act of 1870, ch. 80, § 1.—Ed.

1 Dec 326, 544

TURNEY, J., DELIVERED THE OPINION OF THE COURT.

By Article 11, Sec. 11, of the Constitution, "A homestead in the possession of each head of a family, and the improvements thereon, to the value in all of one thousand dollars, shall be exempt from sale under legal process during the life," &c., &c.

"Nor shall said property be alienated without the joint consent of husband and wife, where that relation exists." &c., &c.

The Act of 1870, ch. 80, § 1, after defining homestead and its objects, provides, "That said real estate shall not be alienated without the joint consent of husband and wife, when that relation exists, to be evidenced by conveyance duly executed as required by law for married women," &c.

The case before us falls directly within the constitutional and statutory inhibitions. The husband attempts, without the consent of the wife, evidenced as required, to alienate the homestead. It can not make a difference that the sale was for full value in money, or other real estate, or other things; here was a homestead in "the possession of the head of a family," the rela-

tion of husband and wife existed, the wife has not consented, by conveyance duly executed as required by law for married women, so then the attempted alienation must fail. This rule obtains as to the right of homestead only. The fee remains qualified by the right of occupancy, which can not be disturbed, while the relation supporting the right of homestead exists.

The purpose of the law is to protect married women and minor children from the improvidence of unfortunate or dissipated husbands and fathers. The facts of this case illustrate its wisdom.

Complainant has failed to make a case for the declaration of a resulting trust in the purchase of the lot.

Reverse the decree, with costs.

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### COPELAND v. BOAZ.

Jackson, June 9, 1877.

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HUSBAND'S NOTE TO WIFE TO RETURN TO HIM—PUBLIC POLICY.—The relation of husband and wife is not changed by their separation; and therefore a note executed by the husband payable to a trustee for the wife, in consideration of her return to him, can not be collected—it is *nudum pactum* and contravenes public policy.

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TURNEY, J.. DELIVERED THE OPINION OF THE COURT.

This suit was instituted upon the following note:—

“On or before the 25th day of December next I promise to pay Thomas Boaz, trustee for my wife, five hundred dollars, for value received, this June 29, 1872. JAMES COPELAND.”

Plaintiff in error and his wife had separated, and the note sued on was executed to induce her to return. The Court below struck out pleas setting up these facts as a defence, and charged the jury that the consideration was sufficient.

*Held*, The parties could not and did not, by the separation, diminish or enlarge their respective rights and duties under the law regulating the relation of husband and wife.

A promise by the husband to pay to the wife, or to another for the benefit of the wife, without something more, is *nudum pactum*. the undertaking contravenes public policy, and is not tolerable in law.

Reverse the judgment.—*The Reporter, Boston, Mass.*

W. P. LANKFORD, *Adm'r, etc., of* W. J. LEWIS, *Dec'd,*  
*v. MARY F. LEWIS et al.,*

AND

MARY F. LEWIS *v. S. M. GLENN, Guard., etc., et al.*

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**Jackson June 2, 1877.**  
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1. HOMESTEAD.—DOWER—WIDOW NOT ENTITLED TO BOTH—WHEN. While a widow is entitled to dower out of her deceased husband's estate, she has no additional homestead right, except as against a creditor of the head of a family, who is seeking to enforce his debt by execution or attachment. A homestead is not included by any statute under the idea of articles exempt from execution, which go to the widow, and not to the administrator.

CASES CITED.—Merriman, adm'r., et al. v. Lacefield, 4 Heisk., 220; Act of March 12, 1868, Sec 2; Act of 1870; Code § 2114, (a) § 2115.

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FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

W. J. Lewis died September, 1869, leaving complainant in the cross-bill his widow, and the six defendants his children, as his heirs, as stated at the bar; the children are his children by a former wife. Lewis left two tracts of land. The widow petitioned for, and had her dower assigned her in the lands of her husband; after this a petition was filed by the administrator to sell land for payment of debts, on the ground of exhaustion of personal assets. In the decree ordering the sale it is recited that the widow "waives her right of homestead as against the debts of the estate, but reserves her right to her homestead out of any land after the debts of said estate have been paid." This decree was made May Term, 1872.

The case has been argued before us on the assumption that the widow was entitled to the benefit of the homestead in addition to dower, under the Act of March 12th, 1868. The right of the widow, it may be correctly assumed, whatever it is, rests on this Act, the husband dying in 1869.

The Act of 1868 is as follows, Sec. 2d: "That the homestead of any housekeeper or head of a family, residing in this State, to the value of one thousand dollars, instead of five hundred, as now provided by law, consisting of a dwelling-house and out-buildings, and land appurtenant, occupied by such person as a homestead, shall be exempt from execution or attachment for the debts of any such head of a family or housekeeper.

We think it too clear for argument that this Act alone applies to, and gives the homestead, as against a creditor of the head of

a family or householder, who is seeking to enforce his debt by execution or attachment, against such householder or head of a family.

It is true Sec. 2115, which requires the declaration of intention to claim a homestead to be registered, is repealed by the Act, but the other provisions remain, and only provide the mode of setting it apart, but do not give any right to the widow or any estate to her in the land; in fact, her rights are not intended to be affected by these statutes, she being simply left as before to her right of dower on the death of the husband. The first Act that gave her any rights on this subject was the Act of 1870, passed in pursuance of the provision of the Constitution of 1870. See Code, 2114a.

The Court below seems to have followed the supposed opinion of this Court, in the case of Merriman, Adm'r, et als., v. John H. Lacefield et als., 4 Heisk., 220. It is not very clear what was the view of the learned Judge in that opinion on this question, but if the opinion can be construed into holding that the widow was entitled, under this Act, to dower as well as homestead, it is not sustained by the statute, and is not law.

The homestead, as provided for by law, is given by our statutes, and only by them, so that it attaches alone where so given; a homestead was never intended to be included by any of our statutes, under the idea of articles exempted from execution which go to the widow, and not to the administrator by our statutes. The language of the act of 1868 is too clear to admit of doubt in its construction, and only gives the exemption as against a creditor with attachment or execution. In this view of the case, the decree below must be reversed, and the cross-bill dismissed at the costs of the widow.

## WALL v. MARSH.

Knoxville, September Term, 1877.

1. PROMISSORY NOTE—CONDITION—DEFAULT—WHOLE SUM DUE—WAIVER—MAKER'S RIGHTS. A stipulation in a promissory note, bearing interest payable annually, that upon a failure to pay interest annually the note shall be due, is a provision for the benefit of the payee, which he may waive, and can not be taken advantage of by the maker of the note.

CASE CITED.—Caruthers v. McBurney, 3 Sneed, 590.

M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

On the 10th of June, 1862, W. B. Hudson, the ancestor of plaintiffs, executed a note payable to defendant, Delilah Marsh, eight years after date, with the following condition attached: "It is understood, if I fail to pay the interest annually on above sum, that it is all to be due from that date, that is, the date of my failure, and the said Delilah Marsh, or her representative, may proceed to collect the principal and interest remaining on said debt after such failure, the above to be in current bank-notes."

The interest was not paid annually, the only payment being credits upon the note as follows: \$20 in April, 1866; \$65 January, 1867; \$20 December, 1868. Hudson executed a deed of trust on certain lands to secure the payment of said note. No steps were taken to enforce the collection of the money until after the expiration of more than eight years from the date of the note, to-wit, in 1875, when the trustee was proceeding to sell the land in accordance with the power of the deed, when the heirs of Hudson, he having died, filed the original bill in this cause, insisting that by the terms of the note it fell due at the expiration of the first year, on the 10th of June, 1863, by reason of the interest not being then paid, and that the note should be scaled to the value of current bank-notes at that date. On the 10th of June, 1863, current bank-notes were greatly depreciated, much more so than notes answering the same description at the expiration of eight years from the date of the note, that is, June 10, 1870.

The Chancellor held, in accordance with the view of the complainants, that the payee of the note was entitled to recover the value of the note in current bank-notes on the 10th of June, '63, from which decree defendant appealed.

*Abstract of Opinion.*—The condition annexed to the obligation was a stipulation for the benefit of the payee in the nature



of a penalty to enforce the prompt payment of the annual installments of interest, a stipulation which she might have enforced, but which she had the right to waive. The condition was not for the benefit of the obligor, who had no right at the expiration of the first year to pay the whole amount of principal and interest on the note. Had he tendered it in proper funds, defendant would not have been bound to receive it; but had he failed to tender any amount on that day, then according to complainant's theory, a tender on the next day of the whole amount would have been good. This would be to place the entire matter in the hands of the obligor, and enable him to decide according to his own interest. See *Caruthers v. McBurney*, 3 Sneed, 590.

Decree reversed, and decree in accordance with the opinion.—  
*Reporter, Boston.*

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## WOODLIE v. TOWLES AND WIFE.

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Nashville, December Term, 1877.

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**HOMESTEAD—DEBT CONTRACTED BEFORE PASSAGE OF LAW—STATUTE OF LIMITATIONS—NEW PROMISE AFTER PASSAGE OF LAW.** The statute of limitations operates *only* to bar the remedy; a new promise, therefore, is not the substantive cause of action, but the original debt. Hence, under the Act of 1870, a homestead is not exempt from the payment of a debt contracted *before* its passage, although the bar of the statute has been completed and the new promise is made *subsequently* thereto.

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DEADERICK, C. J., DELIVERED THE OPINION OF THE COURT.

In 1866, and before the passage of the Homestead Law, the defendant owed the complainant a debt evidenced by note. In 1872 he promised to pay this note. After this promise was made, and more than six years after the note fell due, suit was brought upon it and a judgment recovered. The defendant insists, that, conceding that the promise proved is sufficient to avoid the bar of the statute of limitations, such promise is a new cause of action, and as it was made subsequently to the passage of the

Homestead Law of 1870, he is entitled to have exempted from the judgment a homestead under said Act.

*Abstract of Opinion.*—It is true that the promise to pay a debt barred by the statute of limitations is often spoken of in the books as giving a new cause of action, and it has been said that the action must be on the new promise to pay. McLean, 189. So it has been held by this Court that a claim barred by the statute of limitations is deemed in law extinguished and discharged, and that the new promise is no continuation of the old contract, although such original contract furnishes a sufficient consideration from the new agreement. *Belote v. Wynne*, 7 Yerg., 543, citing *Bell v. Morrison*, 1 Peters, 351. If a debt is extinguished and discharged by the bar of the statute, and the promise to pay it is a new and substantive cause of action, it would seem logically to follow that the action should be brought upon the new cause or the promise to pay, and not upon the extinguished and discharged debt. But this Court has also held that in personal actions to enforce executory contracts, the statute of limitations operates as a bar upon the remedy; and from this deduces the conclusion that a distinct and unequivocal acknowledgement will revive the debt. It would, perhaps, (4 Yerg., 174) have been more accurate to say such acknowledgement would revive or restore the remedy. The debt was not extinguished, but the remedy was lost by the operation of the statute. But in the later cases this Court has held that in personal actions upon contracts, the statutes of limitations bar the remedy only, and do not extinguish the debt. In one case Judge Reese, in referring to the use of the words "extinguishment" and "extinction," as employed by Justice Story, in reference to claims barred by the statute, says: "It is believed that the learned Judge means total extinction of the remedy only;" and adds that "perhaps in every instance, where the law creates a bar, it acts upon the remedy—the party himself extinguishes the debt." 9 Yerg., 63 and 64. And Judge McKinney says in a still more recent case, "a statute of limitation in the nature of a negative prescription applies not to the right, but merely to the remedy. The debt is not extinguished, nor the right destroyed; and hence, upon the express promise or admission of the debtor, the payment of the debt may be afterwards enforced." 2 Swan, 513. In a number of cases, cited in note 10 to § 441, 2 Gr. Ev., the rule in Massachusetts and New York is stated to be that the new promise, by which a debt is taken out of the operation of the statute, does not create a new

and substantive cause of action, but operates only as a waiver of a defense to an action on the old promise, and the removal of the bar of the statute. It is the original debt which constitutes the ground of action, and forms the basis of the judgment. It is upon this theory and principle that suits are instituted upon debts *prima facie* barred. The mode of procedure in our Courts is to institute an action of debt, \* \* \* and the note is declared upon and made profert of by the declaration, although upon its face it appears to have fallen due more than six years before the suit is commenced. \* \* \* If the defendant pleads the statute of six years, upon a replication of a new promise within that period proved, the plaintiff obtains judgment, not upon the new promise, but upon the note with interest from the time it fell due. So it appears the plaintiff recovers upon the note, and it is this note which determines the extent of defendant's liability, and the new promise within the six years had only the operation of defeating the effect of the plea of the statute. 2 Gr. Ev., § 441. \* \* \*

We have repeatedly held that if a debt was contracted before the passage of the Homestead Law, and after its passage a new note is taken for the debt, the homestead would not be exempt from an execution issued upon a judgment obtained upon such new note. Yet, in such a case, the debt for which the new note was executed, would be extinguished, but the consideration for the new note was the antecedent debt. So in this case, although it should be admitted that the new promise is a new cause of action, as in the case of the new note for the old debt, all the authorities hold that the barred debt is a sufficient consideration for the new promise to pay it, and even in this aspect the homestead promise would be liable. But we are of the opinion that the new promise is not the ground of action, but that its effect is to restore the remedy upon the original debt, and that this original debt is the foundation of the action and the basis of the judgment.

Decree reversed.—*Memphis Law Journal*.

TILLMAN, *Adm'r, etc.*, v. COCKE *et als.*

Knoxville, September Term, 1877.

1. CONSTITUTIONAL LAW—ACT CONFERRING LEGISLATIVE POWER ON COURTS INVALID—CLAUSE SEPARABLE—WHEN. The latter clause of § 2, ch. 78, Acts of 1869-70, (§ 3813 d, T. & S. Sts.,) authorizing the Court, in suits by or against executors, etc., to require a party to the suit to testify, confers legislative power on the Courts, and is, therefore, void. But this latter clause being distinct from the preceding, (which contains the general rule of exclusion in such cases) does not render the whole section invalid.

FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

The original bill in this case was filed to settle the estate of complainant's intestate. One Pickle filed his petition as a creditor, which was sworn to, stating that he was the only party cognizant of the facts, the transaction upon which his claim was based being one exclusively between the decedent and himself, having some elements of confidence in it. Upon his application the Chancellor made an order allowing him to testify. The question is,—was this order proper, and the testimony properly permitted in the case?

*Abstract of Opinion.*—It is under Sec. 2, ch. 78, Acts of 1869-70, (§ 3813 d, Thompson & Steger's Statutes), in connection with the previous section, that the right to testify in this case is claimed. The latter section allows all parties to testify, relieving them from incompetency in all civil Courts of this State, notwithstanding they may be parties to the suit, or interested in the issue tried. This is the general rule. The other section, however, enacts certain exceptions: "In actions or proceedings, by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statements by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the Court." It is evident that under this last clause it was intended by the Legislature to give the Court the power to call the party, or require him to testify, and that unless so required he should be incompetent under the previous part of the section quoted. \* \* \* Can this be sustained as a law of the land, or does it not confer on our Courts legislative, and not judicial power? \* \* \* The general rule, which is the law of the land, applicable to all the parties named, is, that they are

incompetent. Such would be the rule to be enforced on objection made to such a witness. \* \* \* But under this latter clause the Court might say: You are incompetent under the law, and therefore can not sustain your claim, but I think this a proper case, and will allow you to testify. This is to leave the rights of parties dependent on the will of the Judge, with no rule prescribed by which he is to be guided in his action,—nothing by which the party can say it is his right to be heard. In a word, in the place of a rule of action prescribed, being made the test of the right of the party, the Court makes the rule and enforces it, or refuses to make it, as he chooses,—thus performing a legislative act; that is, giving the law to the party in the particular case, not deciding upon what the law is. The practical result is, or may be, that the debt may be recovered, as in this case, if the Court chooses to allow the party to prove it; but if not, the right claimed can not be maintained. This would leave no rule for the action of all the Courts of the State by which to be guided, nor the same Court in any case, but would make the law on which the rights of the parties depended as variable as the judgment, whim, caprice, or even prejudice of the Judge. This is not to adjudge what the law is, but to make it; a power which can not be conferred by the Legislature upon the judiciary.

It is insisted that the whole section containing the exception must stand or fall together, not being separable. But we think the clause giving the discretion is distinct from the other, and may well be held void, and the other exceptions stand as the general rule, as was intended by the Legislature. We think, therefore, Pickle was incompetent under the general rule, and the discretion given to allow him to testify is not warranted by the Constitution, and could not be exercised by the Court.

Decree accordingly.—*Memphis Law Journal.*

## BACHMAN v. ROLLER.

S. C. S<sup>d</sup> La a 187.

Knoxville, September Term, 1877.

1. PROMISSORY NOTE—PAROL TESTIMONY—STATUTE OF LIMITATIONS—NEW PROMISE TO THIRD PARTY—SUFFICIENT WHEN. The words, "Par Bank Notes," have a fixed signification in commercial parlance, which can not be varied by parol testimony. Under a replication of a new promise to pay a debt barred by the statute of limitations, evidence of admissions or promises made to a stranger, is only admissible when it appears the debtor intended they should be communicated to the creditor.

SNEED, J., DELIVERED THE OPINION OF THE COURT.

This action was instituted April 1, 1872, upon a promissory note executed January 31, 1860, by the defendant to the plaintiff, and due, one day after date, for \$2,791 in "par bank notes."

On the trial in the Circuit Court the defendant proposed to prove the meaning of the words, "par bank notes," as they were to be understood by the parties in a contemporaneous verbal agreement between them. This testimony was excluded.

Upon a replication of a new promise to the plea of the statute of limitations of six years, the plaintiff was allowed to prove promises and acknowledgement to divers persons other than the plaintiff or his agent.

Verdict and judgment for plaintiff; defendant appealed.

*Abstract of Opinion.*—Evidence as to the meaning of the words, "par bank notes," as they were used by the parties under a contemporaneous verbal agreement, was properly excluded. These words have a distinctive technical meaning, and they must speak for themselves. They are, in commercial and financial parlance, used to denote a state of equality or equal value, an equality of actual with nominal value; and being terms well understood in the law, it was the province of the Court, if necessary, to explain their meaning to the jury.

Is the replication of a new promise to pay the debt barred by the statute of limitations, sustained by the proof? The result of all our adjudged cases on this subject is, that there must be an express promise to pay, or an admission of an existing debt, which the debtor is willing to pay. 7 Yerg., 534; 8 Hum., 656; 2 Swan, 91; 1 Sneed, 464. But we are not aware that the precise question whether such an admission to a stranger would answer the requirements of the law, has ever been directly adjudged

from this bench. It does appear, however, that the question was incidentally adjudged in favor of the plaintiff's view in the case of *Thompson v. French*, 10 Yerg., 457, where the testimony of a stranger to the record, having no agency or other privity with the plaintiff, so far as the case discloses, was permitted to testify to a conversation with the defendant as to an acknowledgement of a subsisting liability, which the Court held conclusive of the case. Whether or not the question was presented and contested upon a like argument, as in this case, we are not advised. It was broadly held in many of the earlier cases on the subject that such an acknowledgement was sufficient, whether made to a third person or to the plaintiff in the action. 5 Harrington, 380; 1 Ala., 225; 9 Wend., 297; 16 Ibid., 477; 4 Wooster, 319; 21 Barb., 351; 4 Ibid., 163; 6 Ibid., 585; 4 Pick., 100; 16 Verm., 193; 1 Harris & Gill, 204; 7 Geo., 505; 4 Porter, 225.

But many other cases qualify the doctrine so as to make the sufficiency of the promise depend upon the fact whether the intention appears that the declaration to the stranger should be communicated to the creditor. *Wakeman v. Sherman*, 5 Selden, 85; 2 Story's Eq., § 1521; 26 Ala., 433; *Collett v. Frayzer*, 3 Jones' Eq., 89. In the last named case, it was held by the Supreme Court of North Carolina that where a person on his death-bed said to a bystander that he owed a certain sum, which he named, and that he wished it paid, that this was a sufficient acknowledgement of the debt to take it out of the statute of limitations. 3 Jones' Eq., 80; 3 Batt. Dig., 420. This is consistent with the more modern rulings on the subject, as it was manifest that the debtor in that case wished and intended that the declaration thus made *in extremis* for the benefit of the creditor, should be communicated to him. And it is said in the note to the case of *Whitcomb v. Whiting*, 1 Smith's Lead. Cases, 889, after an exhaustive review of the authorities, that most of the cases in which an admission to one man, has been held to take the case out of the statute in favor of another, will be found to rest on this ground, or on that of the existence of such a privity between the person to whom the declaration was addressed, and the creditor, that what was said to the former, might fairly be presumed to have been meant to reach the ears and influence the course of the latter. 3 B. & Ald., 141; 2 B. & G., 149; 4 Selden, 362; 29 Ala., 99. We hold that this latter doctrine is the sounder and safer of the two.

Judgment reversed, and new trial awarded.—*Mem. Law Jour.*

KNOXVILLE AND OHIO RAILROAD CO. *v.* J. H. HICKS.

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Knoxville, September Term, 1877.

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1. **CHARTER—POWER TO GRANT.** The power to grant charters of incorporation, with exemptions from taxation, or other like stipulations, binding upon the State, so that the charter, after acceptance, becomes a contract, and irrevocable, falls properly under the head of Legislative power, and such power properly belongs to the legislative department of the State, when there is no special limitation of the powers, as the Legislature possesses inherently all legislative power, and the Constitution is to be construed as limiting or restricting, but not as granting the power.

**CASES CITED.**—Gordon *v.* Appeal Tax Court, 3 Howard, 133; 4 Wheaton, 518; 4 Peters, 514; 1 Black, 436; 8 Wallace, 264; 7 Cranch, 164. *Pacific R. R. v. McGuire*, 20 Wall., 36; *Wilmington R. R. v. Reed*, Shff., 13 Wallace, 264; *Humphrey v. Pegues*, 16 Wallace, 244; 1 Black, 436; *Union Bank v. The State*, 9 Yerg., 490; *Hope v. Deaderick*, 8 Hum., page 1.

2. **SECTION 28, OF ARTICLE 2, OF THE CONSTITUTION OF 1834, CONSTRUED.** Section 28, of Article 2, of the Constitution of 1834, to-wit: "All lands liable to taxation, held by deed, grant or entry, town lots, bank stock, etc., and such other property as the Legislature may, from time to time, deem expedient, *shall be taxable*," imposes no restriction upon the power of the Legislature to stipulate for total or partial exemptions from taxation in charters of incorporation.

**CASES CITED.**—Stewart *v.* Land, 1 Cranch, 299; Martin *v.* Hunter, 1 Wheaton, 351; 6 Wheaton, 418; 12 Wheaton, 290.

3. **EXEMPTION FROM TAXATION IN FAVOR OF RAILROAD—RIGHTS OF THIRD PERSONS, WHO BECOME PURCHASERS OF THE SAME.** Where the charter of a Railroad Company exempts it from taxation, and such road is purchased as a whole, with all the franchises of the old Company, the exemption still attaches to the property, especially when the decree of a Court so empowered by the Legislature has settled that all rights and immunities passed, and nothing remained in the old Company.

**CASES CITED.**—Trask *v.* McGuire, et als., 18 Wall., 391; Morgan *v.* Louisiana, 3 Otto, 217; Tomlinson *v.* Branch, 15 Wall., 460; Philadelphia, Wilmington and Baltimore Railroad, 10 Howard, 376; E. T., V. & G. R. R. Co. *v.* Hamblen Co.

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M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

The plaintiff, a corporation, is the owner of a railroad extending from Knoxville to Careyville, in this State. It paid to the collector of Anderson county the taxes assessed against it under protest and brought this action to recover the amount back, claiming that the road and its appurtenances are exempt from taxation. The facts are presented by an agreed case. The railroad in question was constructed and owned by a corporation char-



tered by the Legislature of this State, under the style of The Knoxville and Kentucky Railroad Company. By an Act passed 25th of February, 1856, which became part of its charter, the capital stock and dividends, road and fixtures were exempted from taxation until the stock paid a dividend equal to the legal rate of interest. There can be no question but that the exemption was granted in express terms. The company had borrowed from the State a large number of its bonds under the General Internal Improvement Act of 1851-2, and having failed to pay the interest on these bonds, proceedings were instituted in the Chancery Court at Nashville, under Acts of the Legislature passed for that purpose, for the sale of this and other delinquent roads to enforce the State's lien. The sale was made and confirmed—certain individuals being the purchasers. They afterwards organized under the general laws passed since the adoption of the new Constitution, as a corporation, under the style of The Knoxville and Ohio Railroad Company (the present plaintiff,) for the purpose of becoming the owner of the road, with its franchises; and by a decree of the Court at Nashville, title was vested accordingly.

Two important questions have been presented and ably argued: 1st, Whether the Legislature had the power, under the Constitution of 1834, then in force, to grant the exemption in question; and 2d, If the exemption was valid in favor of the original company, does that exemption still exist in favor of the present plaintiff as purchaser?

It has been settled, since the Dartmouth College case, that the charter of a private corporation, when accepted, becomes a contract which cannot afterwards be impaired by legislative action when the power to do so is not reserved. Stipulations for exemption from taxation or the payment of a bonus in lieu of taxation, are important elements of the contract, and are protected by section 10 of Article I. of the Constitution of the United States, and a similar provision in the Constitution of the State. That the Legislature of a State has the power to bind the State by such contracts, where that power is not denied by the Constitution, is also a result of these authorities.

As often as this question came before the Supreme Court of the United States, it was earnestly resisted, upon the ground that to permit one Legislature to barter away the States's inherent right of taxation, so as to bind successive Legislatures, is subversive of the Government itself, and allows the burthens of taxation, which

should fall upon all alike, to be shifted from the property of wealthy corporations to the shoulders of the remaining tax-payers. If this was a new question, it would deserve the most serious consideration, and Courts would now doubtless hesitate long before establishing it; still it is too well established to be at once overthrown, and so counsel for the State concede. (See *Gordon v. Appeal Tax Court*, 3 Howard, 133; 4 Wheaton, 518; 4 Peters, 514; 1 Black, 436; 3 Wallace, 264; 7 Cranch, 164).

But these authorities all go upon the assumption that there is no Constitutional restriction upon the power of the Legislature to grant charters of the character in question. If this provision of the charter, granting the exemption, be in violation of the Constitution of the State, it would not be protected. Did the Constitution of 1834 of this State, in force at the time, restrict the power of the Legislature in this regard?

It must be borne in mind that in determining what power the Legislature of a State may rightfully exercise, the Constitution of a State is not to be regarded as a grant of power. The Legislature possesses inherently all legislative power, and the Constitution is to be construed as limiting or restricting, but not as granting the power.

The first question then is, does the power to grant charters of incorporation, with exemptions from taxation, or other like stipulations, binding upon the State, so that the charter after acceptance becomes a contract and irrevocable, fall properly under the head of legislative power? That such power properly belongs to the legislative department of a State, when there is no special limitation of the power, is too well settled to be questioned. The decisions of the Supreme Court of the United States are numerous and uniform, beginning with the *Dartmouth College* case, and coming down to the present time. (*Pacific R. R. v. McGuire*, 20 Wal., 36; *Wilmington R. R. v. Reed*, Shff., 13 Wallace, 264; *Humphrey v. Pegues*, 16 Wallace, 244; 1 Black, 436). Does the Constitution contain any limit or restriction upon the power of the Legislature in this regard?

To understand properly the language of the Constitution of 1834 on this subject, we must bear in mind the terms of the previous Constitution—the powers that had been exercised thereunder, the changes made and the evils to be remedied—at the same time considering the different parts of the Constitution bearing upon the question. The Constitution of 1796 was especially defective in regard to securing equality of taxation, or

the taxation of property according to its value. And this was the evil intended to be remedied by the change made and embodied in section 28 of Art. 2, in regard to the taxation of property according to its value, and securing the equality of taxation. But is there anything in the first clause of this section intended to limit the power of the Legislature to grant exemptions from taxation in charters of incorporation, or (which is the same) to stipulate for a bonus or fixed sum in lieu of taxation? The language is, "All lands liable to taxation, held by deed, grant or entry, town lots, bank stock, etc., and such other property as the Legislature may from time to time deem expedient, *shall be taxable*." Was this intended to mean that thereafter the Legislature should not have the power to stipulate for total or partial exemptions from taxation in charters of incorporation? The Convention of 1834 comprised among its delegates some of the ablest lawyers the State has ever produced. That they were familiar with the principles of the Dartmouth College case, decided some fifteen years previously, and followed in other cases, can not be doubted. It is apparent also that they were familiar with the fact that the Legislature, under the previous Constitution, had exercised the power of granting charters with total or partial exemptions, or contracting for a special bonus in lieu of taxation, notably in the instance of the charter of the Union Bank, granted only two years before, (*Union Bank v. The State*, 9 Yerg., 490), and that the power had never been questioned. With these facts prominently before the Convention, if it was their purpose to restrict the power of the Legislature, we should expect to find such direct provision in regard to the power of the Legislature in respect to charters of incorporation is in the proviso to Sec. 7 of Art. 11, to the effect that the restriction upon the power of the Legislature to grant special privileges, immunities and exemptions was not to be construed to affect the power of the Legislature to grant such charters of incorporation as they might deem expedient for the public good, thereby leaving the power as it previously existed. (See *Hope v. Deaderick*, 8 Hum., page 1). If it had been the purpose of the Convention to restrict the power of the Legislature in this particular, this would certainly have been the appropriate place to insert the restriction, but so far from doing so, we find only the proviso above referred to, which was intended only to exclude the idea that the first clause of the section against the granting of special privileges, immunities or exemptions was intended to limit the power of the

Legislature in regard to granting charters of incorporation.

From this the conclusion seems necessarily to follow, that the Legislature was still left the power to pass laws creating bodies corporate, with all the rights, privileges, immunities and exemptions which it was usual to vest in such fictitious persons, under the general principle of law, previously recognized, and as we have seen, the power in question was previously recognized by the general law and the authorities of the State. We do not say that rights, privileges or immunities might be granted inconsistent with other positive restrictions of the Constitution; and this brings us again to the language of Sec. 28 of Art. 2, to-wit: "All lands liable to taxation, held by deed, grant or entry, town lots, bank stock, etc., and such other property as the Legislature may from time to time deem expedient, *shall be taxable.*"

It has never been contended that this made it imperative upon the Legislature to tax all property. That body might tax or omit to tax; that is, for the time exempt. If a tax was imposed, it was required to be upon the value of the property, and according to the rules of equality. This is made more apparent by the change made by the Constitution of 1870, which declares that all property, real, personal and mixed, shall be taxed, subject to the right of the Legislature to exempt in certain cases which are specifically defined. It is argued that the above clause makes all the property mentioned, and such other as the Legislature might deem expedient, continually subject to the power of taxation. That is, that it shall be and remain taxable, and that this forbids any action by the Legislature which would place property beyond the power of taxation. On the other hand, this section may well be construed as having no reference to the property of corporations to be created, and as leaving the power of the Legislature in this regard as it stood before. This is the more natural construction when we take this section in connection with the clause before referred to, and find that no express restriction is placed upon the power conceded to have previously existed in the Legislature in respect to corporations, in that clause which refers directly to the power to grant such charters. Again, the Constitution of 1834 declared that a well-regulated system of internal improvement should be encouraged, and for such purposes the Legislature has often appropriated the revenues of the State, and further loaned the credit of the State to the extent of immense sums. The power to do this has never been questioned. If the Legislature can thus appropriate and use the public

money, it is difficult to see why it may not stipulate for the release of part of the public taxes for the same purpose, as it would be in effect the same. Upon this declaration of the Constitution the Legislature have from time to time freely acted. The State was without railroads. It was regarded as a public necessity that roads should be constructed. They were to be constructed by corporations; in a sense, private corporations; and yet as it was believed that the resources of the State would be thereby developed and the public prosperity promoted, they were regarded as public improvements, and to be encouraged. *Pacific Railroad v. McGuire*, 20 Wall., 36.

It was foreseen that, as a private speculation, such enterprises would not pay, especially in those portions of the State where the cost of constructing the roads would be unusually heavy; perhaps in no instance has the individual who has invested his money in capital stock of a railroad in this State, as an original stockholder, ever been able to realize his investment, the stock selling generally at very low figures. All this was to some extent foreseen, and to meet this difficulty, *and induce* capitalists to risk their money in the enterprise, this proposition to exempt the property to be thus created was made in consideration of the benefits expected to result to the public from the public improvement. The property now sought to be taxed was not then in existence; it has been created, in part at least by the money invested upon the faith of this stipulation; much of it, for aught we know, may have been brought from other States. The people of the State have certainly, to some extent, realized from the improvements the benefits anticipated; whether to the full extent or not is immaterial. It may or may not have been a judicious contract upon the part of the State. The necessities for revenue now demand contribution from every available source. The property of some of these roads is valuable, and exemptions are odious. But if the law and the contract were valid at the time, we must in good faith abide by their terms, according to their fair and just import.

Upon this question it may be added, that where there has been no judicial construction of a clause of the Constitution, the Courts have given great weight to the construction given to the clause of other departments of the Government. *Stewart v. Land*, 1 Cranch, 299; *Martin v. Hunter*, 1 Wheaton, 351; 6 Wheaton, 418; 12 Wheaton, 290.

Several successive Legislatures that met while this Constitu-

tion was in force, a period of 36 years, granted charters of incorporation, with total or partial exemptions for a time, and during the entire period the power was never questioned. On the contrary, all departments of the Government acquiesced and obeyed the laws thus passed, and under these nearly all of our public improvements have been constructed. This uniform action upon the part of the State authorities is entitled to great weight. Upon this question we conclude that the Legislature had the power to stipulate for the exemption in question.

This brings us to the next question, which is—did this exemption pass to the new corporation by this sale? It is argued that at the time of this sale, which was after the new Constitution went into effect, the Legislature could not grant an exemption from taxation. It is, however, admitted that it might transfer from one to another the existing exemption; but it is denied that this was done. After the appointment of Commissioners on the part of the State to take the necessary steps against the delinquent railroads, it was found that in any attempt to sell the roads serious questions would arise as to the rights of the State and the defendants—whether the State had the right to sell out the entire property and franchises of the companies, or only the State's lien or interest thereon, and what that interest was; whether the State could sell for the entire debt or only the unpaid interest on the bonds; how the rights of stockholders and others would be affected. To meet these difficulties an Act was passed the 22d December, 1870, in pursuance of the right reserved in the General Internal Improvement Act, which directed a bill to be filed in behalf of the State against the delinquent railroad companies, in the Chancery Court at Nashville, which by the Act was vested "with exclusive jurisdiction to hear, adjudicate and determine all questions of law and matters of controversy of whatever nature, whether of law or of fact, that have arisen or may arise, touching the rights and interest of the State, and also the stockholders, bondholders, creditors and others in said road;" \* \* \* "also to declare the exact amount of the indebtedness of each of said companies to the State, and likewise to define, as may be thought proper, what shall be the rights, duties, and liabilities of a purchaser of the State's interest in said roads, or either of them, and what shall be the reserved rights of said companies, stockholders and others, respectively, as against said purchasers after said sale, under the existing laws of the State."

The bill was accordingly filed, and by a decree before the sale the amount of the State's debt was ascertained and adjudged, and also that the same was a lien upon the entire property, rights, privileges, and franchises of the companies; that a sale would transfer all the interest, leaving none in the stockholders or corporation; that a sale of any of the franchises of said company would vest the purchasers with all the rights, privileges, and *immunities* appertaining to the franchises of said

charter and amendments. A sale was made, reported, and confirmed, and title vested as before stated. Without reciting the parts of the various decrees and proceedings bearing upon the question, it is sufficient to say that it is distinctly adjudged that not only the property of the old company, but all its rights, franchises, privileges, and immunities, as defined by the charter and laws and the decree in the cause, passed to and vested in the new company.

We are of opinion that the State, having expressly provided for the adjudication of all these questions by the tribunal appointed, and the purchase having been made upon the faith thereof, the validity of the adjudication can not now be questioned by the State. But it is argued that under the decree vesting the new company with the rights and franchises of the old company, the exemption from taxation did not pass; that this decree could not have the effect of putting the new company exactly in the shoes of the old in all respects, so as to make the new company the same legal entity as the old. This result could only be effected by a purchase and transfer of all the stock of the old company, or by the sovereign power of the State through the Legislature, where that is allowable, and as a consequence, although the property of the old company was transferred to the new, with the privileges and franchises necessary to the use and enjoyment thereof, yet the legal existence of the old corporation was not thereby completely annihilated, but said corporation still existed, and to that existence the exemption in question still adheres as an incident, not having been in terms transferred by the Legislature. We can not clearly appreciate the idea of the right of exemption existing in the old company after all its property and franchises appertaining to the use thereof were gone from it and vested in the new. Even if the old corporation still existed in the abstract, it certainly no longer had a practical existence for the purpose of its creation, and certainly to say the exemption in question still existed in the old company, when there was nothing upon which it could operate, would have no meaning.

It is manifest that when the purchasers came to contract for the entire road and franchises, it was important to know whether they were to have as purchasers the right to own and use the property, free from taxation, as specified in the old charter. This was an important element in fixing the price. The property, with this exemption, was worth more than it would have been without it. A sale of the property and franchises without the

exemption would practically have taken from the old company all that was valuable to it; and yet the purchasers would not acquire what the old company owned. The old company had the property and franchises with the exemption, while the new one would acquire the property and franchises without the exemption. This would be selling the entire property and franchises of the old company for the payment of its debts, and yet destroying an important element of its value, refusing to give the old company the benefit of the exemption in the sale, and yet destroying its existence so far as of practical importance. By this means the exemption would be practically repealed, and the State would be allowed to resume the right of taxation over the property and franchises in question, which it could not have done had the old company continued to be the owner.

This argument is used to show that the parties must have understood from the adjudications to which we have referred, that they were purchasing with the exemption and with every element of value which attached to the property and franchises in the hands of the old company, and such, we think, is the fair and legitimate construction of the proceedings referred to. The case of *Trask v. McGuire et als.*, (18 Wall., 391), from the Supreme Court of the United States, is wholly different. There the railroad, etc., was purchased by the State of Missouri, and, of course, the exemption was merged, as the exemption from the right of the State to tax would mean nothing when the State itself became the owner of the property. And so, the State having become the absolute owner, when it came to sell the said road again, could sell with or without the right of exemption without injustice to any one, but as the new Constitution of Missouri before the resale by the State had forbidden the grant of such exemption, it was held that the Legislature could not authorize a sale with the exemption. But here the State never became the owner of the road, and the principle of the case does not apply.

This opinion was prepared more than a year ago, and since then we have seen the recent case decided by the Supreme Court of the United States, *Morgan v. Louisiana*, 3 Otto, 217. There are probably some points of difference between that case and this; the exemption there was of the capital stock, works, workshops, warehouses, vehicles of transportation, and other appurtenances of the company. It is certainly clear, as said in that case, that a purchaser of an engine or car from the company would not hold such property exempt from taxation, or that the



purchaser of a house would not hold it exempt from execution, because it had been exempt in the hands of the persons from whom it was purchased; but here the entire road, as a whole, was held free from taxation; it was purchased with all its appurtenances as a whole, with the franchises of the old company; that is, the right to use the property as the old company had the right to use it; and if the purchaser acquires all that was valuable, the exemption must attach to the property, especially as the decree settles that all rights and immunities passed, and nothing remained in the old company. With great respect for the high tribunal making the decision, we are not convinced by it that the exemption in such a case is a mere personal privilege that can not pass to a purchaser of the entire road with franchises without a new legislative grant; the exemption being part of the charter, can not be repealed by the Legislature. It is a right for which a consideration has been given, but the decrees of the Court in this case are in pursuance of the Act of the Legislature, and are equivalent to a legislative grant. Though the State has obtained the benefit of a sale purporting to be with the exemption, we think the case of *Tomlinson v. Branch*, 15 Wall., 460, sustains our conclusions. (See, also, *Philadelphia, Wilmington and Baltimore Railroad*, 10 Howard, 376.)

It will be observed that the question whether an exemption is granted in the charter in the first instance, or what language is necessary to grant an exemption, as presented at the present term, in the case of the *E. T., Va. & Ga. R. R. Co. v. Hamblen County*, is a different question from the one we are now considering, as to the transfer of such exemption upon a sale of an entire road and franchises to a purchaser; the latter question is not governed by the same reasons or rules of construction, but the decrees in this case pass to the purchaser the entire franchise, with the rights and immunities appertaining thereto. We hold upon both questions for the plaintiff.

Judgment reversed, and judgment entered for the plaintiff.

**FREEMAN, J.**—We place our concurrence as to the first question upon the ground that this being a public improvement, the Legislature might grant it aid and appropriate money for its use; and releasing taxes in its favor is the same in effect; but we reserve the question as to the power of the Legislature to make such exemptions in favor of private corporations not chartered for the purpose of constructing public improvements.

1875

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# General Legal Information.

CONDUCTED BY  
JAMES C. BRADFORD,  
OF THE NASHVILLE BAR.

List of Journals from which Abstracts are taken :

	ABBREVIATION.	ADDRESS.	PUBLISHED.	
Albany Law Journal	Alb. L. J.	Albany, N. Y.	Weekly.	15 cents.
American Law Record.	Am. L. Rec.	Philadelphia Pa.	Monthly,	50 cents.
Central Law Jourdal.	C. L. J.	St. Louis, Mo.	Weekly.	50 cents.
Chicago Legal News.	C. L. N.	Chicago, Ill.	Weekly.	10 cents.
Copp's Land Owner.	C. L. O.	Washington, D. C.	Monthly.	20 cents.
Memphis Law Journal.	M. L. J.	Memphis, Tenn.	Quarterly.	1 dollar.
Pittsburg Legal Journal.	P. L. J.	Pittsburg, Penn.	Weekly.	10 cents.
The Reporter.	The Rep.	Boston, Mass.	Weekly.	25 cents.
The Texas Law Journal.	Tex. L. J.	Tyler, Tex.	Weekly.	15 cents.
Washington Law Re- porter.	Wash. L. R.	Washington, D. C.	Weekly.	10 cents.
Weekly Notes of Cases.	W. N. C.	Philadelphia, Pa.	Weekly.	20 cents.
Western Jurist.	West. Jur.	Des Moines, Ia.	Monthly.	50 cents.

OWING to the fact that the Editor of this department has been quite sick this month, we are unable to publish any abstracts in this number.

A VERY valuable contribution by the Hon. Edward H. East, of the Nashville Bar, appears in this number; it is a digest of the Homestead decisions, and will be found especially useful since it places before the practitioner, in quite a narrow space, such a memorandum as will enable him to find at once nearly every principle applicable in a case involving this question. The author's reputation is sufficient to give the article authority in the Courts of Tennessee.

## BOOK NOTICES.

THE LAW AND EQUITY REPORTER and the American Law Times and Reports have combined. A very neat weekly journal, entitled *The Reporter*, with Howard Ellis and Rowland Cox as editors, makes its appearance now as the result of a union between these two law magazines so long known to the profession under the most favorable circumstances. The cases are uniformly well selected, making the work one of the most useful of American law journals. Subscription \$10 per annum.

WE find among our exchanges for this month a "quarterly" entitled *The Memphis Law Journal*—this is its first appearance. For neatness of style

and typographical execution it has no superior in the catalogue of American law journals, and to furnish a more accurate description, it becomes necessary to mention some of its contents and contributors—there will best be found the true merit of the work: "The Chancery System of Tennessee"—Hon. W. F. Cooper; "The Judiciary—What it is, and What it Should Be"—Hon. Henry Craft; "Tax Legislation in Tennessee"—Hon. Jos. B. Heiskell; "Hon. Andrew Ewing—In Memoriam"—Hon. T. W. Brown; "A Judicial Construction of the Act of the Tennessee Legislature Increasing the Jurisdiction of the Chancery Court"—E. S. Hammond, Esq., Special Chancellor; "Recent Decisions of the Supreme Courts of Mississippi and Tennessee."

"The object of the *Journal* is to present to the profession the matured views of its members, upon subjects of practical as well as high literary value."

M. B. Trezevant, of Memphis, is the proprietor and editor.

The reasonable sum of \$4.00 is the subscription to this valuable addition to legal literature; single copy \$1.00.

**FIELD ON THE LAW OF PRIVATE CORPORATIONS.** A treatise on the Law of Private Corporations, by George W. Field, author of "A Treatise on the Law of Damages," etc., etc. Albany: John D. Parsons, Jr., publisher.

Mr. Field has given a fresh statement of the law in his text, and has illustrated and enforced it in elaborate notes, giving the decisions of all the State and Federal Courts.

The book seems, from the examination we have given it, to exhaust the subject. The organization, nature and character of corporations, the rights, duties and obligations of members, stockholders and directors, and of offi-

cers and agents generally, are treated at length; the law relating to stock, to corporate meetings, to corporate contracts and by-laws, is stated with unusual fullness. The other principal subjects are the liability of corporations for torts; suits in equity by and against corporations and directors; execution and appointment of receivers; amalgamation and consolidation; eminent domain; quo warranto; liens on corporate property, and their priority; dissolution; mandamus; taxation, negligence and wrongful acts of agents or servants.

The arrangement is systematic, the style is easy and perspicuous, and the treatment is comprehensive and satisfactory. The thoroughness with which the work is done is evidenced by the Table of Cases Cited, which covers over forty closely printed double column pages, and includes over seven thousand authorities.

We do not hesitate to commend Field on Corporations to the legal profession.

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### HOMESTEAD.

Abstracts of the decisions of the Supreme Court of Tennessee on the subject of Homestead, furnished by EDWARD H. EAST.

Previous to the Constitution of 1870, the right of homestead was derived alone from the *statutes* of the State.

By Art. 11, Sec. 11, of the Constitution, a homestead becomes a constitutional right.

This Constitution went into effect May 5th, 1870. See Ordinance, Sec. 4, and proclamation by Governor, on pages of Code 122-3. It was so adjudicated. See *LEGAL REPORTER* for July, 1877, page 77.

The Constitution declares a homestead in possession of each head of a family, and improvements thereon, to the value of \$1,000, shall be exempt from sale under legal process.

1. During the life of such *head* of a family.

2. During the life of the *widow*.

3. During the minority of the children occupying the land.

4. Nor shall the same be alienated without joint consent of husband and wife, when both are living.

5. Shall not operate against taxes, the purchase-money or improvements.

The Act of June 27th, 1870, approved June 29th, 1870, commencing at Sec. 2114a of Code, was passed to carry out the constitutional provision, and also declares how the homestead may be sold.

The case of *Wilson v. Lowe*, 7 Cold., 153, did not arise under the Constitution or Act of 1870, but under the previous Act, and was a certiorari to the Circuit Court to quash the proceedings of commissioners, appointed to lay off homesteads, because one of the commissioners was related to the creditor, which was directly in the teeth of the old Act, and would be of the Act of 1870. See Sec. 2116.

*Merriman v. Lacefield*, 4 Heis., 209, holds that widow can not take both dower and homestead, under the Act of 1868, chap. 85, but if dower is worth less than \$1,000, she may make up the deficit in the homestead.

She can now take both. See Act of 1873.

*Hager v. Bowman*, LEGAL REPORTER for May, 1877, page 20, holds: Husband may convey the homestead, if he has no wife, but has children.

*Moore v. Harvey*, LEGAL REPORTER for May, 1877, page 28, decides: That the reversionary interest of the husband in the homestead may be mortgaged or sold.

*Neam v. Campbell*, LEGAL REPORTER for May, 1877, page 28: "If the husband sells the land and move away, and dies before he acquires another homestead, the widow may have a homestead allotted in the land so sold, but

is not entitled to rents and profits of the same during the life of the husband." Also holds: That widow may be defeated by a voluntary abandonment of the homestead.

*Crawford v. Crawford*, LEGAL REPORTER for June, 1877, page 1: "Where a debt was contracted before homestead Act of 1868, and a note was given subsequently for the debt, the exemptions can not prevail over the debt.

*Powell v. Warren*, LEGAL REPORTER for June, 1877, page 47: "While the wife's right of alimony can not prevail over creditors of the husband, her homestead right can and will.

*Bilbrey v. Poston*, LEGAL REPORTER for July, 1877, page 77: Before the 5th of May, 1870, (at which time the Constitution went into operation) there was no legal inhibition to restrain the alienation of the homestead of a husband, and all transfers made by him before that date are good and valid.

*Thompson v. Wickersham*, LEGAL REPORTER for October, 1877, page 209: The right of homestead can not prevail over either vendor's or mechanic's lien.

*Hager v. Fowlkes*, decided at Nashville, Feb. 3rd, 1877: "Where the debt has been contracted since the homestead Act of 1868, and before that of 1870, the homestead is saved."

*Cowan, McClung & Co. v. Johnson*, decided at Knoxville, May 27th, 1876: The husband and wife joined in a fraudulent conveyance of the wife's property to the wife's father, creditors filed bills attaching the property and attacking the conveyance. The same day the bills were filed, the fraudulent conveyee re-conveyed to the wife. Held, the fraudulent deed, in which the wife joined carried the title, together with homestead, and the subsequent conveyance to her did not entitle her to homestead.

*Tarver, Strauss & Co. v. Bissinger* and wife, decided at Knoxville, May

20th, 1876, holds: "When the husband and wife execute a conveyance, and the same is acknowledged, as required by law, they part with their homestead, though the deed contain no express stipulation of the homestead.

*Williams v. Williams*, **LEGAL REPORTER** for February, 1877: A conveyance of the homestead of the husband, the wife not joining, is void as to her, and such a conveyance so endangers her right that she may file a bill to have the cloud removed and the homestead allotted.

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We will furnish every month hereafter abstracts from nearly every opinion delivered by the Supreme Court of Tennessee.

#### ABSTRACTS OF DECISIONS OF THE SUPREME COURT OF TENNESSEE.

*Nashville, December Term, 1877.*

##### JURISDICTION VACATED BY APPEAL.

Defendant was convicted of gaming and fined, from which judgment he appealed. At the same term, on a day subsequent to the entry of this judgment, the Court added a sentence of six months' imprisonment. *Held*, that the sentence of imprisonment was void, the jurisdiction of the Court having been vacated by the former judgment and appeal.—*Steve Johnson v. The State*, Jan. 26, 1878.

##### INDICTMENT FOR HOUSE-BREAKING.

An indictment for house-breaking will not lie against a party who enters a building under his charge by a key, and steals articles therefrom.—*Thomas v. The State*, January 26, 1878.

##### JUDGMENT ON BAIL BOND—SECURITY ON APPEAL.

A bail bond is a bond for the payment of money within the meaning of the Code, Sec. 3162, and on appeal from a judgment thereon the security is bound for the whole debt, damages

and costs.—*Little v. The State*, January 26, 1878.

##### FRAUD UPON CREDITORS.

Webb mortgaged to Gooch personal property to secure him against loss as his security on notes given for the purchase of land. H., B. & Co. failed to set aside the mortgage for fraud, but Webb, having used the proceeds of the personalty, while under mortgage, to pay for the land, in order that he might claim it as a homestead. It was held by the Court this was a fraud upon the rights of his creditors, and H., B. & Co. were allowed to subject the land to the payment of their debt to the extent that the mortgage property had been used in its payment.—*Hollins, Burton & Co. v. Webb*, January 26, 1878.

##### ASSIGNMENT OF AN ILLEGAL NOTE.

A party purchasing property and paying for it by assignment of a note indorsed "without recourse," and which bears on its face the rate of interest not allowed by law, and which consequently can not be enforced by law in our Courts, can not, in the absence of fraud, deceit or bad faith, be held liable either on an implied warranty growing out of such a contract or for the original consideration.—*Walker v. Clark et al.*, January 26, 1878.

##### ASSIGNMENT OF A NOTE, VALUELESS—WHEN THE ASSIGNEE MAY RECOVER.

In all cases when the assignor, whether by delivery or "without recourse," of a bill or note *knows* it to be of no value, and the assignee receives it in good faith, not aware of the fact, paying value for it, the assignor may be compelled to repay or return the consideration thus received.—*Id.*

##### WHEN THE ASSIGNEE OF A NOTE CAN NOT RECOVER.

But in a case where a party gets all he bargains for, takes the note for the thing sold, with full knowledge of what

it is, the paper is precisely what it purports to be, is not forged, void, or subject to any equity, he requires nothing else, and the other agrees to give nothing else. In the absence of fraud, deceit or good faith, he must stand by the contract, and take its results.—*Id.*

**CHANCERY COURT—JURISDICTION.**

On a bill filed to set aside satisfaction of a judgment, occurring by sale and purchase under an execution, the Chan-

cery Court, to the end that full justice may be done, has jurisdiction to order a sale of the property under its own decree.—*Spurlock v. Akers*, Dec. 8, 1877.

**VENDOR'S BILL—FAILURE OF TITLE.**

A failure of title to land is no defence to a vendor's bill. It is not error to refuse to allow a decree against defendant for the balance due after a sale of the land.—*Johnson v. Mulligan*, Dec. 8, 1877.

# TO THE MEMBERS OF THE BAR

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NASHVILLE, TENN., Jan.-26, 1878.

I HAVE undertaken, as an individual enterprise, to publish the unreported decisions of the Supreme Court of this State; and after much delay, consequent upon my change of plan, which was at first to publish in book form the back numbers of the *Commercial and Legal Reporter*, as explained by General Heiskell's letter, I have completed this, my first volume. It begins where Ninth Heiskell concluded, and contains every case of the slightest importance as far as I have continued, in chronological order.

It is my purpose to report as many volumes as the Profession will sustain me in publishing. I am encouraged to believe that a sufficient number will be taken to justify me in continuing the work I have begun. The book, doubtless, possesses many defects upon which criticism could be lodged, but I feel assured that my efforts in supplying a manifest want will be properly appreciated and imperfections pardoned by the Profession.

The lawyers of Tennessee have shown a liberality in patronizing *The Legal Reporter*, which merits my sincerest appreciation, and I am rather inclined by this last undertaking, to relieve their necessities than to profit by their wants. I have placed the price of the Volume now ready at \$3.50—a sum so small that I think it will be satisfactory to every lawyer disposed to aid me in my attempt to aid him. On receipt of this amount the book will be forwarded to any address, the subscriber paying the postage.—20 cents—or the book will be sent to any address forwarded us by postal card, collections being made on delivery.

JERE BAXTER.

50 Cherry St.



THE  
Tennessee Legal Reporter.

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NEW SERIES.

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*DECISIONS OF THE SUPREME COURT,*

DIGESTED AND PUBLISHED BY

JERRE BAXTER.

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VOL. I. NASHVILLE, TENN., MARCH, 1878. No. 11.

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RICHARDSON *v.* BROWN & LYLES AND CUBBINS &  
GUNN.

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Jackson, May 19, 1877.

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1. NOTE—USURY—PLEADING AND PRACTICE.—When a bill of exchange, bearing 12 per cent. interest from maturity, purports to have been made in Mississippi, where such a stipulation would be valid, the bill will not be void on its face in contracting for usurious interest, and will give the holder prima facie right to recover. But it may be shown by proof to be a Tennessee contract, and subject to the interest laws of this State. Such violation releases the debtor from all interest in excess of 6 per cent. simply.

CASES CITED.—Thompson *v.* Collins, Kellogg & Co., 2 Head, 444; Senter & Co. *v.* Bowman, 5 Heisk., 17; Branson *v.* Isler, 6 Hum., 279; Act of 1835; Constitution, Art. 11, Sec. 7; Act of 1869-70, ch. 69; T. & S., Code, § 1944a.

2. SAME—SAME.—Under Sections 1 and 2 of the Act of 1869-70, whether the sum above the legal rate is contracted to be paid before, at the time the note

falls due, or after it is due, is equally a contract for a sum of interest above the rate allowed by law, and is usurious.—Ed.

FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

Plaintiff sues defendants, as endorsers, on the following bill of exchange:

\$10,000.

JACKSON, MISS., April 15, 1873.

Six months after date, pay to the order of Messrs. Cubbins & Gunn and Brown and Lyles, the sum of ten thousand dollars, value received, with interest at 12 per cent. per annum from maturity until paid.

MEMPHIS WATER COMPANY,

By JOHN CUBBINS, Pres't.

Addressed to Toof, Phillips & Co., Memphis, Tenn.; written across the face, "Accepted."

TOOF, PHILLIPS & Co.

Defendants plead the general issue, payment, and a special plea, denying that the bill of exchange was made at Jackson, Mississippi, as was alleged in the declaration; on the contrary, aver that it was made, endorsed, accepted and delivered to defendants at Memphis, in the State of Tennessee, and that it was dated at Jackson, Mississippi, at request of plaintiff, and with the intent and purpose to evade and violate the laws of the State of Tennessee in relation to usury.

Plaintiff replied to this plea that the bill was made at Jackson, Mississippi, and not at Memphis, Tennessee, for the purpose of evading and violating the laws of Tennessee in relation to usury.

Upon the issues thus made the parties went to trial. It is proper to add that the declaration averred the instrument to have been made in the State of Mississippi, and that by the laws of that State any rate of interest agreed upon in writing by the contracting parties may be charged and collected. Plaintiff sought judgment for the amount of said bill with interest, etc.

It is conceded that the law of Mississippi is as stated. The case was tried by the Court without the intervention of a jury, and a judgment rendered for defendants, from which an appeal in error is prosecuted to this Court.

The decision of the Court was based upon the idea that the bill of exchange sued on was void on its face, and therefore no judgment could be rendered on the same in our Courts.

We must assume the fact to be from the finding of the Court, based on the testimony in the record, that the bill was made, endorsed and delivered in Tennessee. It is true, from the letters

passed between the parties, it appears that the proposition to borrow the money was made to plaintiff by letter sent to him at Jackson, Mississippi, but there was no completion of the contract by such letters. They but opened the negotiations; the contract, as well as the bill, was made in the city of Memphis, the precise terms of the contract not being definitely settled by the letters referred to, but evidently agreed on after Richardson came to Memphis about the business. On this state of facts the question is, whether the judgment of his Honor, the Circuit Judge, can be sustained. It may be remarked that the place of the date of the bill, with the averments of the declaration, was made in the State of Mississippi, where the parties could contract for any sum as interest they might agree upon, and gave the plaintiff a *prima facie* right to recover, under the doctrine of the cases of *Thompson v. Collins, Kellogg & Co.*, 2 Head, 444, and *Senter & Co. v. Bowman*, 5 Heisk., 17.

This being so, it seems clear the bill was not void on its face for illegality in contracting for usurious interest. Had it been so, there was no necessity to raise the question by plea of facts, showing the illegality; that is, that it was made in the State of Tennessee. Had this not been done, or the proof had not shown on the trial under the general issue, which probably might have been done, that the bill was a Tennessee contract, we take it under the decisions cited, plaintiff would have been entitled to a judgment, on production before the Court of his bill, with liability of the parties fixed according to law, as was done in the case. It is true Judge Caruthers, in his argument, 2 Head, 444, says, if the note in that case was shown to have been made in Tennessee, (it purporting to have been at St. Louis), it would be illegal on its face, and the plaintiff would be repelled from our Courts. But this language is to be understood in connection with the question before him, and not literally. It could not mean that the note was void on its face by reason of its stipulation for interest at ten per cent., because the fact that it was made in Tennessee should be shown in proof, as this proof could not be held to be placed in the face of the note when made. He only meant that when proof should be made of the fact that it was a Tennessee contract, then the stipulation for the ten per cent. interest in connection with this proof rendered it void, by reason of this stipulation, and so evidently was the holding of the Court in that case.

The question then is, whether a party can recover who sues on

a bill, the illegality of the promise contained therein not appearing on its face, but shown under a plea and proof under the law of this State as it stood at the time of making this contract, and if so, to what extent?

It is conceded that, since the case of *Brunson v. Isler*, 6 Hum., 277, decided in 1845, and repeatedly recognized since, the rule has been settled in this State that where a party sues on a note or contract, on its face usurious, there can be no recovery. We need not here stop to criticize the soundness of this rule, as we do not have that question now before us. We only remark here that, logically, and on general principles, on the ground of illegality of the contract the result would equally follow, whether shown on the face of the paper or by plea and proof *aliunde*, no other rule being prescribed by statute.

We assume it to have been settled by the case of *Thompson v. Kellogg & Co.*, and *Senter & Co. v. Bowman*, that under our law as it then stood, where the illegality appeared, or could be made to appear, under plea and proof in cases like the present, then no recovery could be had, because of the fact thus shown. The Court so held unquestionably, whether correctly or not, we need not discuss. This was under the Act of 1835.

In the view we take of this case, it is unnecessary to go into several questions of interest pressed upon our attention in the learned argument of counsel. The question of usury is one regulated by statute in our State. By the Constitution of 1870, Art. 11, Sec. 7, is provided: "The Legislature shall fix the rate of interest, and the rate so established shall be equal and uniform throughout the State; but the Legislature may provide for a conventional rate of interest, not to exceed ten per cent. per annum."

In pursuance of this provision of the Constitution the Legislature, by the Act of 1869-70, ch. 69, T. & S. Code, § 1944a, and succeeding sections, regulated this question of a conventional rate of interest. The first section allowed parties to contract for interest not exceeding the rate of ten per cent. per annum, expressing the terms of the contract in the face of the instrument. The second provided that six per cent. should be the uniform rate of interest throughout the State, unless a different rate was agreed on by the parties, and reduced to writing in the face of the contract, as provided in the previous section.

The third provided the penalty for violation of the provisions of the Act by enacting: "If any person or persons shall violate the provisions of this Act, and shall contract for a greater rate of

interest than ten per cent. per annum, as herein provided, it shall be unlawful, and shall operate as a release of the debtor from all interest in excess of six per cent.; and if the same has been paid, it may be sued for and recovered by the party paying the same, or his heirs, personal representatives, or creditors.

We think it beyond question, this statute must be held to control in this case. Its object is to regulate the question of conventional interest in this State. It does so by its provisions completely. The case before us is a contract made in Tennessee while this law was in force. It is a case of conventional interest, agreed on by the parties, and the rate placed in the face of the writing. It is shown to be such a contract by the defendants themselves under their plea. The statute then is definite and clear, that in each case of violation of its provisions, that is, by contracting for a larger per cent. than is allowed, such violation shall operate as a release of the debtor or debtors from all interest in excess of six per cent. This violation appears in this case, and the release follows; but this is all that does follow in the way of forfeiture by the terms of the statute. To hold that no recovery could be had for the principal, and six per cent. interest, would be to add to the statute, in addition to the release of the amount above, six per cent., the penalty of forfeiture of the whole debt, thus making the law not enforcing that which has been made.

It is, however, earnestly insisted that the stipulation for interest being for twelve per cent. after maturity, is not usurious, but is only in the nature of a penalty, for which numerous authorities are cited. We do not deem it necessary to go into an examination of these authorities in this case. Whether sound on principle or not, is not important to us, as the question of what is usury is one well defined in our statute. Sec. 1943 of the Code is, "Interest is the compensation which may be demanded by the lender from the borrower or creditor from the debtor for the use of money."

By the next section it is provided that six per cent. per annum shall be the rate, and any excess over that rate shall be usury. The same principle is found in the Act of 1869-70, Sections 2 and 3. Under these provisions it is clear that whether the sum above the legal rate is contracted to be paid before, at the time the note or bill falls due, or after it is due it is equally a contract for a sum as interest above the rate allowed by law, and is usurious. What difference can it make in the essence of the tran-

saction that the excessive rate shall be agreed to be paid for one period rather than another? Is it not equally the compensation demanded by the lender or the creditor for the use of his money? We think it is, most certainly. The fact that the party might relieve himself from this payment by payment of the bill at the day agreed upon for its falling due, only prevents other contracts from being enforced against him; but if he for any cause failed to pay, then the interest at the rate contracted becomes due by virtue of the agreement, is paid as interest for the continued use of the money, and is contrary to the requirements of the law.

We therefore hold, the Court below erred in not rendering judgment for the amount of the bill, with six per cent. interest, and proceeding to render the proper judgment, direct one in accordance with this opinion.

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JOSEPH W. ALLEN *v.* C. C. MOSS.

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Jackson, June 9, 1877.

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1. **TAX TITLE—EJECTMENT—COLLECTOR'S DEED.**—The terms of the Statute, which make the recitals of a collector's deed prima facie evidence of the facts contained therein, apply only to the collector who makes the sale, and can not be extended to his successor.

Code, §§ 627, 628, 640 and 641; Act of 1843, ch. 92; Act of 1809, ch. 84, Sec. 1; Code, §§ 3056 and 3058.

2. **SAME—SAME—SAME.**—A tax collector has no such power as will enable him to make a deed conveying title, when out of office, to a party who purchased from him during his term of office. Section 640 of the Code requires the deed to be made by the collector or his successor, as an officer, in office at the time.

3. **EJECTMENT—DERANGEMENT OF TITLE.**—When two parties claim title under some third person, it is sufficient to prove the derivation of title from him, without proving *his* title.

CASE CITED.—*Wortham v. Cheny*, 3 Head, 470.—Ed.

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FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

This is an action of ejectment for a tract of land in Dyer county, containing 997 acres.

Plaintiff claimed title under a deed from the Union Bank of Tennessee, of date July 25, 1865, conveying this land in trust to him for the benefit of its creditors. This deed was registered in Dyer county on the 22d September, 1875.

Defendant, Moss, claims to have the title of said Bank by virtue of various tax sales and deeds made under the same by the tax collectors, or their successors who made said sales.

The question, then, between plaintiff and defendant is, which has the title of the Bank, both claiming to have it, and both deriving whatever title they have from this common source. This relieves us from the examination of the chain of title and objections made to it by the defendant under the rule stated in the case of *Wortham et al. v. Cheny*, 3 Head, 470, that "when both parties claim title under some third person, it is sufficient to prove the derivation of title from him without proving his title."

The defendant here derives his title, whatever it may be, from the Bank, and plaintiff claims his from the same source. The source of the title being the same, the only question, as we have said, is, who has the title of the Bank?

We do not consider it necessary to fortify this rule by authorities. It has so often been approved by this Court—in fact, was so approved in a contest for this very land in 1874—opinion by Judge Deaderick—as not now to require further discussion.

The question remains whether defendant, by virtue of the tax title he presents in this record, has the title of the Bank?

The first of three deeds introduced by defendant is one by R. M. Tarrant, dated March 5, 1861, who was then collector of taxes for Dyer county, and is based on a sale made by Wm. M. Watkins, in 1859, for taxes assessed against this land in 1858.

The next two deeds are made by T. H. Benton, who was tax collector in 1871, one on sale purporting to have been made by Tarrant, who was tax collector in 1860–61, deed made January 13, 1872; the other, of same date, on sale made by Hassel, Sheriff and Tax Collector of Dyer county in 1859.

The recitals of these deeds for the present may be assumed to be full, so far as the facts are required by our statute to be stated in the deed of a collector of taxes. They do not purport, nor are they made by the officer who made the sales, but by successors, or subsequent tax collectors. There is nothing to support these deeds; that is, no evidence of a report of the land for unpaid taxes, nor order of condemnation and sale, nor any advertisement. In a word, they stand on their recitals as evidence of the

facts necessary to make a valid sale, and it is insisted, are to be taken as *prima facie* evidence of the existence of the facts recited in them by virtue of Sections 627, 628, 640 and 641 of the Code. The first two Sections simply provide the requisites of a valid sale for taxes taken from the Act of 1843, ch. 92, and make the collector's deed reciting their existence *prima facie* evidence of the facts. These sections, in terms, apply only to the collector who makes the sale, and can not be extended to the deed of his successor. But by Sec. 640, it is provided: "The collector selling the land, or any of his successors, may make a deed to the purchaser, or to any person to whom he, the purchaser, directs the deed to be made after the time of redemption has expired. This is all very clear, and simply gives authority to the successor, or any successors being in office, to make a deed when the collector who sold the land has failed to make a deed as required by law.

Section 641 provides: "The collector, in executing said deed shall only be required to recite the compensation paid, such description of the land to be conveyed as will identify it, the judgment upon which the sale was made, and the date thereof, in what Court it was rendered, the fact of legal notice having been given, and the sale and date of the sale of the property. And in all cases where these requisites are complied with and are recited in the deed the same shall be good and effectual between the parties."

These sections, taken together, fairly construed, can only mean that the collector or his successor may make a deed. But when the requisites of a good deed, to be effectual between the parties, are considered, the language is "the collector, in executing the deed," that is, the collector selling the land referred to in the preceding section; for if it was intended to apply to a successor, it would have been, "the collector or his successor."

It has long been settled that the recitals of the deed of the officer making the sale are evidence of their truth, as in case of a sheriff, but at the same time, it is equally well settled that a deed of a successor of the sheriff, or one who did not make the sale, is not evidence of the truth of its recitals. The reason of the rule is obvious. In the one case the act is done under oath by the officer, and is a recital of facts within his own knowledge; in the other case the act is done by another, and he has no personal knowledge, nor was it his own official act.

By §§ 3056 and 3058 of the Code it is provided that a suc-



cessor in office of any sheriff, coroner or collector, shall make a deed for land sold, and the latter section provides "which deeds shall be as valid as if executed by such former officer."—Act of 1809, ch. 84, Sec. 1. Yet it was never held that the recitals, such as of notice as required by law, should be effective as evidence, when made by the successor. Such a rule would be to require the successor to state the facts under oath officially, which is the reason for making them effective as evidence, which he is totally unable to do, having no personal knowledge of them, or else it would be to make the statements of a party of facts about which he could and did know nothing whatever, equal to the statement under oath of one who did know them. This would be absurd. No such innovation on principle was intended, and nothing of the kind should be held as an inference, unless the language was too clear to admit of doubt. In this case the language of the statute is confined to the deed of the collector, and not to his successor. Reason, sound policy and precedent require that it shall not be extended beyond its words in the direction indicated. If such a rule were established, it is perfectly easy to see how any purchaser at a tax sale can always have the evidence of a good title from a successor. He has but to prepare one containing all required facts to make a good title, present it to the successor, who can not object to signing, as he is required to do by law, and can not object to one recital more than another, because he knows nothing of the truth of any of them, and the work is done, a good *prima facie* title made out, although it may be that not a single material recital in the deed is true. No such view as this can be sustained or adopted by any Court consistent with either established principle or sound policy. Other objections fatal to the effect of these deeds might be pointed out, but this suffices. They may be left out of the discussion as muniments of title in defendant.

The next question is, as to a tax deed made by John H. York, tax collector of Dyer county, or purporting to be such, made to defendant on the 13th day of January, 1872. The deed, however, is signed by York as "tax collector for Dyer county, for the year 1869."

It will be seen that York does not assume, in signing the deed, to be then tax collector of Dyer county, but only signs as tax collector for the year 1869. The deeds of Britton, who was the tax collector at the date of making this deed, show that York was out of office at the time, to-wit, 13th of January, 1872, the

date of the respective deeds. The only question that need be noticed as to this deed is, whether on these facts the collector for 1869, out of office, had authority to make a deed that would convey a title to a purchaser, who purchased while he was in office. It is clear he had no such power. Section 640, authorizing the collector selling the land, or any successor of his to make deeds, only means that if the collector, while in office, fails to make the deed, then a successor shall do it, but requires it to be made by one or the other of these officers, as an officer in office at the time. Sections 661 and 662 do not help this deed. The first section gives the collector two years from the expiration of his term to collect all arrearage of taxes that are due and owing for the time for which he was collector. This does not refer to making deeds at all. The next section simply provides: "He may sell lands condemned by the Circuit Court for taxes due and unpaid, and make titles to the same at any time within two years from the expiration of his term of office, and if he fail or neglect to sell such lands, then it shall be sold by his successor."

It is evident this only applies to lands condemned during his term of office, which he has failed for any cause to sell, and was intended to enable him to go on and complete the sale, and thereby collect arrearage of taxes as provided for by the previous section. If he does sell these lands, he is then authorized to make title to the same, but to no other lands whatever. This deed, then, is void, made without authority of law, and communicated no title to defendant.

The jury found for the plaintiff, under the charge of the Court, which may admit of slight criticism in some verbiage, but on the whole was substantially that defendant's deeds gave him no title, as we have held in this opinion. We can see that the result obtained is the proper one, and that defendant presents no valid title to this land. Under these circumstances we would not, in any case, reverse for slight inaccuracies, even though they were of more moment than found in the charge before us.

The result is, the judgment is affirmed.

MARY A. REDMOND *et al.* v. Y. W. REDMOND.

Nashville, December Term, 1877.

1. SUPERSEDEAS—HOW AND IN WHAT CASES SUPREME COURT CAN EXERCISE IT.—Under the authority given the Supreme Court by Sections 3933, 3934, 4512 and 4513 of the Code, to supersede interlocutory orders and decrees, that Court can simply suspend or supersede, for the time being, the execution of such orders and decrees as are of a nature to be actively and affirmatively enforced, and are *in fieri*; but have no power, in this mode, to reverse the action of the inferior Court, or to set aside, or annul, or supersede orders or decrees, which are merely of a negative or prohibitory character, or such as have been executed.

CASES CITED.—McMinville & Manchester R. R. Co. v. Huggins & Price, 7 Cold., 217; Mabry v. Ross, 1 Heisk., 769. — *See also, Richmond v. Yates, 373 art. 4, 204, 1 Jan 78.*

2. SAME—CHANCELLOR'S FIAT.—Nor has the Supreme Court, in a proceeding of this character, the power to supersede the fiat of a Chancellor awarding extraordinary process.—ED.

M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

Two causes were pending in the Chancery Court at Franklin, one styled, America Redmond *et al.* v. Y. W. Redmond, and the other, Mary Ann Redmond *et al.* v. Y. W. Redmond, when, on the 23d of December, 1876, a supplemental bill, as it is styled, was filed against the same defendant by Mary Ann Redmond and others, praying for an attachment of Redmond's estate, in aid of the proceedings pending. The process was awarded by a fiat of a Chancellor, and issued and returned executed. On the 16th of January, 1877, Y. W. Redmond presented his petition, in which he shows that an attachment had been issued under said bill to Williamson county, and had been returned levied upon certain property, and in which he prays that the attachment and levy thereof upon his property be discharged.

This relief is prayed for upon the grounds that upon the face of the bill the process was not authorized, and that the same was void upon its face. The defendant thereupon moved in open Court, upon the face of the supplemental bill and attachment, and upon his petition, to dismiss the bill and quash the attachments, upon the following grounds:

1st. The bill did not allege that it was the first application for attachment.

2nd. That the bill contained no allegation of the amount of the illegal claim or demand against the defendant.

3d. That there was no allegation that the claim or demand was just.

4th. That the pauper's oath to the bill was taken by part only of the complainants.

5th. That the attachments themselves did not state upon their faces the things required by the Code to be stated in writs of ancillary attachments.

Pending this motion, the complainants moved to amend, by showing that it was the first application for attachment, and also as to the pauper's oath. The Court was of opinion, as shown in the decree, that in these two respects the proceedings were amendable, and that the other grounds stated for the motion and in the petition were not well taken, and thereupon denied the motion to dismiss the bill and quash the attachments, and allowed the complainants to amend in the two particulars mentioned.

This is the entire substance of the decree. Another order was made on the 19th of January, but it is not material to notice it.

On the 23d of June, 1877, Redmond presented his petition to one of the Judges of this Court, accompanied by a transcript of the supplemental bill, petition to quash, and the two decrees referred to, the attachment including an attachment to Davidson county, and the return thereon of the execution of the same by a garnishment served on Edgar Jones, Cashier of the Third National Bank of Nashville, and the answer of Jones to the garnishment. The petition prays for a supersedeas, in these words:

"Petitioner prays your Honor to grant him a writ of supersedeas, superseding the execution of said interlocutory decree, so far as the same does or can warrant the writ of attachments so issued to the county of Davidson, and the steps so taken thereon, and so far as the same does or can warrant the issuance of any other writ of attachment against his estate; and the fiat of the Chancellor, so far as the same does or can warrant the issuance of any other attachment hereafter against the estate of the petitioner, and to grant your petitioner such other relief," etc.

The fiat of the Judge grants "the supersedeas as prayed for," upon the usual bond.

A motion is now made in this Court by the complainants to discharge the supersedeas, and by the defendant to extend the same to the full extent authorized by the Judge's fiat, which the supersedeas issued it is said does not do.

We have several times followed the construction given to the sections of the Code on this question in the case of the McMinn-

ville & Manchester R. R. Co. *et al.* v. Higgins & Price, 7 Cold., and in Mabry v. Ross, 1 Heisk., 769. That is, that under the authority given to supersede interlocutory orders and decrees, we can simply suspend or supersede for the time being the execution of such orders and decrees as are of a nature to be actively and affirmatively enforced against a party, and are in fieri; but we have no power in this mode to reverse the action of the inferior Court, or to set aside, or annul, or supersede orders or decrees, which are merely of a negative or prohibitory character, or such as have been executed.

We can not, therefore, supersede an order granting an injunction, as this requires nothing to be done, but is simply prohibitory. Nor can we supersede an order dissolving an injunction, as the decree directs nothing to be done. To supersede such an order would be to grant an injunction.

We have only to apply these principles to the present case. What is the decree of the Chancellor which is superseded? What does it order and adjudge?

1st. The decree refuses to dismiss the bill upon motion, or to quash the attachments and levies. It is too clear for argument that we can not supersede that part of the Chancellor's decree refusing to dismiss the bill upon motion. This would be upon application for supersedeas to reverse the decree of the Chancellor and dismiss the bill.

2nd. Can we supersede that part which refuses to quash the attachments and discharge the levies? The Chancellor's decree in this respect requires no execution; it simply refuses to take the action involved by the defendant. The motion was refused. How can we supersede the execution of this order? How shall we say that his refusal to make the order moved for shall not be executed?

The effect of this would be simply to do what the Chancellor refused to do. He was asked to quash the attachments and levies, and refused. But suppose we supersede his refusal, and say his order of refusal shall not be executed. What effect does this have, except simply to leave it as before, unless we go farther, and say the process shall be quashed? This we certainly can not do.

But it is said this order is susceptible of being affirmatively enforced, because the effect of it is to require the defendant to plead or answer over, which he should not have been required to do. It can hardly be maintained that an order of a Chancellor,

refusing to dismiss a bill upon motion, for want of equity, and requiring the defendant to answer, could be superseded by this Court. If so, we could stop all further action in the Court below, and yet leave the cause pending there. For a supersedeas does not bring up the case, but leaves it still pending in the Court below.

But it is argued that the attachments in this cause were absolutely void. Suppose they were. This Court has no power in this mode to quash the process, or declare it void. This application was made to the Chancellor, he decided otherwise, his action is not yet before us for review, further than to determine whether he has made any decree, the execution of which for the time being, we may supersede, and as we have seen, the only decree he has made is not of a nature to be executed at all. There is nothing to supersede. We can in this mode no more reverse the Chancellor for refusing to declare this process void, than we could reverse any other error. It can hardly be contended that we may supersede that part of the Chancellor's decree allowing the amendments. Such an order does not come within the scope of a supersedeas.

Again, it is said we may supersede the fiat of the Chancellor awarding the process; and this is in part the prayer of the petitioner. We do not think there is any authority for this. There is none in the Statute. We may supersede interlocutory or final orders or decrees, but not the fiat of a Judge granting extraordinary process. If we are to be called upon to supersede the orders of Judges and Chancellors granting extraordinary process, and direct the Clerks not to obey their fiats, we will have a new and extensive field of labor—one, we think, not authorized by our laws. Besides, in this case the fiat had been executed. The attachment to Davidson county, which is especially complained of, was executed and returned before the supersedeas was granted. Whether the levy was valid or not is now material.

But again, the prayer of the petition is to supersede the decree and fiat of the Chancellor, so far as it does or can warrant the issuance of any other attachment hereafter. This is certainly novel. There is nothing in the decree about the issuance of another attachment, and it will be time enough to supersede orders after they are made. It is not even stated that any other attachment is apprehended. Besides, it is not intended for a supersedeas to operate as a bill of Peace.

It is earnestly argued that the service of the garnishment on

the Cashier of the Third National Bank did not attach or impound the funds of the defendants in the Bank, and that the Cashier has shown by his answer that he had no funds in his hands. All this may be true, but this question is not before us. The Chancellor, so far as appears in this record, has not acted upon the garnishee, or upon a motion to discharge him.

We are of opinion that the supersedeas must be discharged.

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G. W. G. PAYNE v. GEORGE S JOHNSON.

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Nashville, December Term, 1877.

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1. **SUPERSEDEAS TO AN INTERLOCUTORY DECREE—PRACTICE.**—The petition for supersedeas to an interlocutory decree or order, under Sections 3933 and 3934 of the Code, should be accompanied by a transcript of the record, or at least so much thereof as will show clearly the error complained of.

2. **INFERIOR COURT—BINDING DECISION.**—Until a previous decision of the Supreme Court is reviewed and reversed by that Court, it is error in the Court below to disregard it.

3. **MORTGAGED PROPERTY—EXEMPTION OF.**—The rights of a mortgagor to reclaim, before sale, exempted property included in the mortgage, discussed.

CASE CITED.—Denny v. White, 2 Cold., 283.

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NICHOLSON, C. J., DELIVERED THE OPINION OF THE COURT.

This is a motion to discharge and set aside an order made on a former day of this term, directing a supersedeas to issue, superseding and suspending an interlocutory decree in this cause in the Chancery Court, whereby an injunction, previously granted, was dissolved. The supersedeas was limited to certain property subject to be sold under said interlocutory decree, which property is by law exempt from execution and sale.

The first objection taken to the order for the supersedeas is, that the petition for supersedeas was not accompanied by a transcript of the record in the cause. The petition was filed under

Sections 3933 and 3934 of the Code. These sections make no provisions for notice in such application, but contemplate an *ex-parte* application upon petition; but not requiring the petition to be accompanied by a transcript of the record. But while there is no requirement of this kind, the Court is of opinion that the better practice in such case is, to require the petition to be accompanied by a transcript of the record, or at least so much thereof as will show clearly the error complained of. Upon this holding we required the petitioner to furnish a copy of the record in the case before us, and we have reconsidered the application for supersedeas, with the advantage of having the transcript as well as the petition.

We find that the petition contains a full and substantially correct statement of the proceedings, as contained in the transcript.

We are satisfied, upon an examination of the record, to let the order for supersedeas stand. One of the questions in issue between the parties is, whether certain specific articles of personal property, exempt by law from execution, were included in a mortgage made by petitioner in May, 1870, to defendant; and if so, whether petitioner has not the right, before the sale of said property under the mortgage, to withdraw his consent to this appropriation, and to claim them under the law for the benefit of his family? The Chancellor held, in opposition to the spirit and tenor of the case of *Denny v. White*, 2 Cold., 283, that the exempted property included in the mortgage was subject to sale; and, upon dissolving the injunction, ordered the same to be sold.

We do not, in this application, decide whether the case of *Denny v. White* is good law or not; but we hold, that until that case shall be reviewed and reversed by this Court, it was error in the Court below to disregard it, and order a sale of exempted property. Especially as there were other questions involved in the case, upon the final determination of which, it may turn out, as alleged by petitioner, that the debts provided for in this mortgage may be satisfied without resorting to the exempt property. Upon both grounds, the supersedeas suspending the sale of the exempted property until a final hearing was ordered, and the order will stand as already made.

The motion to discharge it is disallowed.



## JAMES GLASGOW v. THE STATE.

Nashville December Term, 1877.

1. PRACTICE—SPECIAL JUDGES—INCOMPETENT TO TRY CASES—WHEN.—In criminal cases, where the regular Judge is incompetent, and the attorneys for both the prisoner and the State agree upon a member of the bar as a Special Judge, the entire proceedings, judgment and verdict will be nullities, leaving the case as if no trial whatever was had. The prisoner, not having been in jeopardy, will be remanded for trial *de novo*.

2. SAME—SAME—SAME.—Where a Judge is incompetent for having been of counsel, it is not grounds for objection that he presided when the indictment was found, and ordered it spread upon the minutes, and was also presiding when the plea of not guilty was filed, these being merely ministerial acts, affecting in nowise the merits of the prisoner's case.

TURNER, J., DELIVERED THE OPINION OF THE COURT.

The prisoner was convicted of murder in the second degree, and has appealed to this Court. The objection that Hon. N. W. McConnell, Judge of the Fifth Judicial Circuit, and who had been employed to prosecute before his election and before the finding of the indictment, was presiding when the indictment was found, and ordered it spread upon the minutes of the Court, and was also presiding when the plea of not guilty was filed, is not well taken. These were merely ministerial acts, in nowise affecting the interest of the prisoner on the merits of his case.

The law directs, in plain and unequivocal terms, what should be done. That this was done was recited by the Clerk on the minutes of the Court, verified by the signature of the Judge, a mere formal act, awarding no proof, deciding no question.

The omission to have spread the indictment upon the minutes would in no way have enlarged or diminished the rights of the accused. The policy of the Government in requiring a spreading upon the minutes is to provide against the consequence of the loss, abstraction or destruction of the original.

A more serious objection arises upon the following entry of record: "The regular Judge, N. W. McConnell, being incompetent to try this cause, by reason of his being counsel in the cause, it was agreed by both the counsel for the State and the prisoner, and the prisoner himself, that S. F. Wilson, a member of the bar, shall preside as special Judge in the trial of this cause; thereupon N. W. McConnell retired from the bench and S. F. Wilson took the bench."

Was this proceeding regular and according to the laws of the State? We think not. There is no provision of the Constitution nor act of the Legislature, authorizing or directing the constitution of a Court, or the supply of a vacancy for incompetency, or other cause by the mode pursued in this case.

This was not an inferior Court created by the Legislature, nor was it an election by the attorneys of the Court, as allowed by ch. 78, Sec. 1, of the Act of 1870.

In the appointment or selection of special judges in criminal cases, the law authorizing it must be strictly pursued and observed.

As already stated, there was no authority under the Constitution or by Statute for the proceedings in this case.

The result is, the entire proceedings, verdict and judgment are nullities, leaving the case as if no trial whatever had been had. The prisoner was never in jeopardy, and is remanded for trial *de novo*.

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## THE STATE v. T. J. KEETON AND D. A. McGRADY.

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Nashville, December Term, 1877.

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1. PUBLIC SCHOOL LAW—VIOLATED—WHEN.—A contract to set out trees, shrubbery and evergreens around a school-house, or a contract to enclose a school-house with a fence, and to furnish furniture for the room, is such a contract as the Board might make, and is, consequently, in violation of the 19th Section of the public school law.

2. CONTRACT—CONSIDERATION IMPLIED—WHEN.—The making of a contract implies a consideration, and the charge of taking a contract imports, *ex vi termini*, an agreement to do on a sufficient consideration.

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FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

The defendants in these cases are indicted for violating the 19th section of the public school law. It is, "that no Director shall be a teacher in the public schools of his district, nor take

any contract for building a school-house in his district, nor any contract which his Board is competent to make, nor become the owner of a school warrant." The offence, in one case, is a contract to set out trees, shrubbery and evergreens around the school-house; in the other, a contract to enclose the school-house with a fence, and furnish desks and furniture for the house.

The contracts are clearly such as the Board might make, and are forbidden by the Statute.

By Section 4596 of the Code, it is provided, when the performance of any act is prohibited by statute, and no penalty for the violation of such statute is imposed, the doing such act is a misdemeanor. This is precisely the case before us. It may be that these contracts were innocently made, but the evil intended to be guarded against was the danger of public officials using their positions and the influence incident to them in promising advantageous contracts to the public detriment in matters under their official control. With the spirit of official peculation so rife in the land, the Courts can not fail to see the propriety of strictly enforcing all laws intended to guard the public against such abuses.

It is argued, however, that in the case of Keeton, it is not averred that he took or received pay for the work he contracted to do. There is nothing in this, as the making a contract necessarily implies a consideration, and the charge of taking a contract imports, *ex vi termini*, an agreement to do on a sufficient consideration. If it was a gratuity, it may easily be shown in defense by proof. No corrupt motive need be adjudged. It is the thing that is forbidden, regardless of the motive.

Reversed, and remand for further proceedings.

## W. W. PARKER v. JOHN SPARKMAN.

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Nashville, December 15, 1877.

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1. **WILLS—EXECUTORS—POWER TO SELL LAND, ETC.**—Whether an Executor is to distribute the fund need not be found expressed in direct terms on the face of the will, but is to be arrived at from the whole scope and context of the will, the fairly inferred intention of the testator; in other words, such a power to sell land on the part of the Executor may be gathered from the will by necessary implication, as well as by express designation.

CASES CITED.—Kent, 4 Vol.; Meakings v. Cromwell; 1 Selden, N. Y. Rep., 139-40.

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FREEMAN, J., DELIVERED THE OPINION OF THE COURT.

By agreement of parties, on the trial of this cause in the Court below, the only question presented in this case for our decision is, whether the will of Elijah Hill conferred the power on his Executor, George Sparkman, to sell the lands in controversy? If so, the judgment of the Circuit Court is correct; if not, it must be reversed.

The first clause of said will provides for the payment of testator's debts out of any moneys that he may be possessed of, or may first come to the hands of his Executor.

The second clause is, "I give and bequeath to my heirs an equal part of all my personal and real estate."

Third. "I request that all my personal property be sold on a twelve months credit, and that all my real estate be sold on one and two years credit."

He then appoints G. W. Sparkman his Executor.

The will was made in 1854, and probated in November of that year.

The rule as to the power of an Executor to sell real estate is thus given by Chancellor Kent, Vol. 4 of Commentaries:

"If the will directs the estate to be sold, without naming the degree of the power, it naturally, and by fair implication, devolves upon the Executors, provided they are charged with the distribution of the fund."

The question whether the Executors are to distribute the fund need not be found expressed in direct terms on the face of the will, but is to be arrived at from the whole scope and context of the will, the fairly inferred intention of the testator; in other words, such a power to sell on the part of the Executors may be

gathered from the will by necessary implication, as well as by express designation. It was so held in *Meakings v. Cromwell*, 1 Selden N. Y. Rep., 139, where, by a Statute of New York, it was provided, if the "testator omitted to designate by whom the power is to be exercised, its execution shall devolve on the Court of Chancery." See authorities cited in the above case.

There can be no question that if this was a bequest of personalty, as such the Executor would be bound to make the distribution of the fund.

It will be seen that in the second clause an equal share of personalty and realty is given to his heirs, and in the third clause he directs that his personal property shall be sold on twelve months credit, and then that his real estate be sold on one and two years credit. Take these provisions, and it is obvious that the testator intended that the parties taking should not take the personalty given in kind, but only the proceeds, and that the same is his intention as to the realty; that is, the party is only to take the proceeds, and not the land.

This then amounted to a direction to "convert out and out," in which case the "moneys arising from the sale are to be distributed by the Executors as legacies." See 1 Seld., 140.

So that on either ground, that of a power by fair implication to sell, no one else being designated, and on the ground that the conversion was directed, and the parties took as legatees of personalty, which the Executor was to pay, he was authorized to make the sale. We find the authorities cited in the above case abundantly sustain these views.

We therefore hold that the Executor had the power to sell the land, and affirm the judgment of the Court below.

FRANCIS M. PRICE *v.* THE STATE OF TENNESSEE.

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Jackson, May 26, 1877.

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1. STATE CAN NOT BE SUED—WHEN.—The State can not be sued by her citizens in her Courts, even in a defensive suit; and a demurrer to this effect will be sustained.

CASES CITED.—Butram *v.* State, at Knoxville; Foley *v.* State, at Jackson.

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DEADERICK, C. J., DELIVERED THE OPINION OF THE COURT.

Complainant was Revenue Collector for Jackson County from 1865 to 1872, against whom motions were made by the State for Revenue collected, and which he had failed to pay over.

These motions were made in the Circuit Court of said county, and were still pending and undetermined when this bill was filed to enjoin their prosecution and transfer the litigation to the Chancery Court.

The complainant contests his liability, and insists, for various reasons stated in the bill, the questions at issue can be better tried in the Chancery than in the Circuit Court.

The cause was heard upon the demurrer of the State, its Treasurer and Comptroller, and the demurrer was overruled, and the defendant was allowed to appeal.

The defence made, amongst others, was that the State could not be sued.

The cause was heard at a former term, but was held under advisement to await the argument and determination of other causes, involving the same question.

Since the argument of this cause we have held, in the case of Butram *v.* The State, at Knoxville, that the State could not be sued by her citizens in her Courts, even in a defensive suit. The same thing was held also in a case at Jackson, of Foley *v.* The State.

These cases are decisive against complainant's right to maintain this suit.

The Chancellor's decree, overruling the demurrer, will be reversed, and the demurrer will be sustained, and the bill dismissed.

W. C. GOSSETT *v.* THE STATE.

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Nashville, December Term, 1877.

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1. ACT OF THE LEGISLATURE UNCONSTITUTIONAL.—WHEN.—The Act of March 23, 1875, ch. 94, § 12, which provides a penalty for failure to comply with contracts made by persons for the delivery of produce, merchandise or property to parties advancing on the same, is unconstitutional, because the bill embraces more than one subject.

CASES CITED.—Constitution, Art. 2, § 17; Cooly Const. Lim., 141-4. Ind. Cen. R. R. Co. *v.* Potts, 7 Ind., 681.

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SNEED, J., DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was indicted, under the 12th section of the Act of March 23, 1875, ch. 94, for having received of certain merchants and factors an advance of money upon his crop of tobacco, upon a promise of consignment, and having fraudulently sold and delivered said crop of tobacco to another person, in violation of his said contract and agreement.

The plaintiff in error was tried and convicted, and adjudged to pay a fine of fifteen hundred dollars, from which judgment he has appealed in error to this Court.

This Statute creates a new felony in this State, and is highly penal in its terms. The facts of the case are, that the defendant, a planter of the county of Robertson, and having a large crop of tobacco, the production of his farm, applied to the firm of Smith & Kennedy, merchants and factors in the city of Clarksville, for an advance of \$225.00 upon said crop, which, on a promise of consignment, they made to him, taking his promissory note for the amount, which they were to retain out of the proceeds of the tobacco. When the tobacco was made ready for shipment the defendant was advised by one Boone, to whom he was indebted, that a certain mercantile firm, for whom the defendant was largely bound, had failed and gone into bankruptcy; and he was requested by Boone, who feared the bankruptcy of defendant, to secure the debts due to Boone, or for which Boone was bound, by a mortgage of property. It was proposed to transfer the tobacco crop for this purpose, to which the defendant interposed the objection that said crop was already bound for Smith & Kennedy's advance, and must be consigned to them. Upon consultation, however, with a lawyer, it was finally agreed that the tobacco

crop should be conveyed to Boone, and a bill of sale, absolute on its face, was accordingly prepared by the attorney and executed by the defendant.

By a contemporaneous agreement, it was expressly stipulated that the sale of the tobacco was for the purpose of securing Smith & Kennedy and Boone, and another creditor, and that the tobacco was to be consigned to Smith & Kennedy, according to the defendant's contract with them. At that time the market price of tobacco justified the parties in believing that it would bring enough to secure all the creditors intended to be indemnified by the mortgage to Boone. Tobacco, however, began to decline in the market, and Boone, without the knowledge or consent of the defendant, and thinking it best for all parties, shipped the tobacco first to Nashville, and thence to New York, which was ultimately put upon the market and sold at very low prices—the sale producing only about half, perhaps, of the estimated value of the tobacco at the time it passed into the hands of Boone. The result was, that the proceeds were absorbed, leaving the debt to Smith & Kennedy unpaid. We recite the facts to illustrate the good intentions of the defendant, whose good faith in the transaction can, we think, in no manner be impugned. The tobacco was diverted from the destination he had given it without his consent, and when it was finally made known to him he expressed his regret that it had been done.

There are several assignments of error upon the argument, but in the view we have taken of the case, it becomes unnecessary to notice them. A question meets us at the threshold of the inquiry that must be held decisive of the case. It is against the policy of the law and the traditions of the Courts upon a statute of doubtful validity to pronounce it repugnant to the organic law, if the decision of the case can repose upon any other ground. But when a statute is clearly unconstitutional, it is no less the duty of the Courts so to pronounce it. This statute creates a new felony in this State, and its violation involves a maximum punishment of five thousand dollars fine, and five years imprisonment in the penitentiary. It is the 12th section of an act containing thirteen sections. The act is entitled, an "Act to define the rights and duties and regulate the liabilities of ware-housemen and factors." The several sections of the act, except the 12th, seems to have some specific or general relation to the subject indicated in the bill. The 12th section is in the words following: "Whosoever shall buy any cotton, tobacco, or other



produce, merchandize or property, for cash—and shall sell, hypothecate, or pledge the same to another, and use the proceeds thereof for any other purpose than the payment of the seller, vendor, or party advancing thereon, or shall ship, convey, or otherwise make way with, or shall deliver to another any such cotton, tobacco, or other produce or merchandize, without payment, to said seller or vendor, or party having advanced thereon, shall be guilty of a felony. Upon conviction thereof, shall be punished by fine in any sum not over five thousand dollars, or imprisonment in the State prison for not exceeding five years—or by both such fine and imprisonment.” Act of 1875, ch. 94, § 12.

This is a general statute and adds a new and important felony to our criminal Code. It is found in an Act entitled, an “Act to define the rights and duties and to regulate the liabilities of ware-housemen and factors.” But it applies to all sorts and conditions of men who buy and sell cotton, tobacco, or other produce or merchandize, or any species of property whatever, no matter from whom they buy, or from whom they obtain an advance, or to whom they sell the same. It is certainly not germane or homogeneous with an Act to define the rights and duties and regulate the liabilities of ware-housemen and factors. The Constitution of this State provides that no bill shall become a law which embraces more than one subject—that subject to be expressed in the bill. Art. 2, § 17. The object of this provision is obviously judicious and wise. It was intended to prevent improvident as well as fraudulent legislation, which most often occurs by engrafting sections and clauses in a bill incongruous with its general subject, and inconsistent with its declared object, as indicated by its title. In many of the State Constitutions there is a like provision. In that of New Jersey the object is thus stated in the section itself: “To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be embraced in the title.” And so in many other States there are provisions in the organic law that not only require that they should correctly indicate the purpose of the law, but which make the title to control and exclude everything from effect and operation as law, which is incorporated in the body of the act, but is not within the purpose indicated by the title. Cooly Const. Lim., 141.

“The general purpose of these provisions,” says Judge Cooly, “is accomplished when a law has but one general object, which

is fairly indicated by its title. \* \* \* The generality of a title is no objection to it, so long as it is not made a cover to legislation, incongruous in itself, and which, by no fair intendment, can be considered as having a necessary or proper connection." Ind. Central R. R. Co. v. Potts, 7 Ind., 681; Cooley, 144.

It is very clear to our minds that the 12th section of the Act in question is repugnant to the provision of the Constitution cited, and is, therefore, unconstitutional and void.

It results that the judgment in this case must be reversed and arrested, and the defendant discharged.

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## STATE OF TENNESSEE v. WILLIAM MARTIN.

Nashville, December Term, 1877.

**1. CHARTER—IMPAIRING THE OBLIGATION OF A CONTRACT—TOLL GATES—POLICE POWER OF STATE.**—The Act of 1849-50 is not binding on Turnpike companies, the charters of which had been passed, accepted and the company organized under it, before the passage of such Act, when the charter prescribed the rights to take toll of all persons without limitation, etc., the charter being a contract, and as such can not be impaired. The police power of a State can not afford relief in such case.

**CASES CITED.**—Cooley Const. Lim., 572, 573, 577.

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**FREEMAN, J., DELIVERED THE OPINION OF THE COURT.**

The defendant was presented by the Grand Jury of Williamson County for taking toll, as gate-keeper, on the Nolensville and Nashville Turnpike, of a party passing through the toll-gate on his way to mill with grain for his family use.

We suppose this proceeding was instituted as a case to test the rights of the Company and the citizen, and as such, is one of general interest. It is claimed to be sustainable under Sec. 1437 of the Code, which is as follows:

"But no toll shall be claimed or taken from any person passing from one part of his farm to another part thereof; or from persons going to or from funerals, or places of worship; or to or from

militia musters, if required to do militia duty; or from a grist-mill, with grain for family use; or from any person traveling on foot."

It is pretty clear, from the reading of this Section, that by a fair construction it only applies to the particular toll-gates, authorized by the previous Section, 1434, and regulated as to their charges at such gates by Sec. 1436. The first Section is taken from the Act of 1849-50, ch. 72, Sec. 18, and provides: "That Turnpike companies have the right to erect one toll-gate for every five miles of road; to place them on such parts of the road as they may deem best, but not nearer an incorporated town than one mile and one-half, nor within four miles of each other; and to erect gates as fast as sections of five miles from either terminus are completed."

Then follows Section 1436, fixing the rate of tolls: "Such companies may collect"—which rate is different from that provided for such gates as are authorized in many of the Turnpike charters—"as to gates authorized by such charters." After this follows the Section we have quoted, on which this presentment is based, providing, "But no toll shall be claimed or taken," in the cases cited, one of which is, "from parties going to or from a grist-mill with grain for family use."

It is shown in the proof in this case that the Company had never accepted this Act as an amendment to their charter, but always acted under its original provisions, except in charging less in some cases, since the change of coinage, as by taking 5 cents where they were entitled to  $6\frac{1}{2}$ , and 10 cents where they were entitled to  $12\frac{1}{2}$  cents.

But waiving this aspect of the case, and assuming, as argued, that this Section is a general regulation for all Turnpikes in the State, the question is, can it be sustained as valid and binding on a company, the charter of which had been passed, accepted and the company organized under it, before the passage of the Act of 1849-50, which charter prescribed the right to take toll of all persons without limitation, and fixed the rates of such toll, or provided for specified tolls in particular cases?

The Nolensville and Nashville Turnpike Company was incorporated by an Act of the Legislature in 1836, and had, by the 2nd Section of the Act, conferred on it all the rights of a previous charter granted to the Franklin Turnpike Company. By the 7th Section of the latter Act it is provided what shall be charged for passing along said road, and the amount fixed in each

case therein specified, among which things is, a two wheeled carriage, 12½ cents. And such seems to have been the vehicle in the case now before us.

It is now admitted in argument that the charter is a contract, and as such, can not be impaired, and indeed it is too late now to argue that question. Whatever might be thought of the soundness of the principle in the Dartmouth College case, as an original question, it has been so long acquiesced in, so often applied, and interwoven itself so completely into our jurisprudence, that it can probably never be disturbed by legislative or judicial action. If its results work injury, the remedy must be sought and applied in the exercise of the sovereign power of the people, by a change of the Constitution of the United States. We need not refer to authorities on this question. It has been too often discussed, and the principle applied by this Court, to need further support.

The right to take the tolls prescribed in the charter must be taken as one of the terms of the contract, and the investment of the moneys of the corporators in building the road, in consideration of the benefits and privileges thus granted. This being so, the contract must stand intact, and the rights granted remain without diminution, not subject to impairment by any law, without consent of the corporators, unless some other rule of law can be brought to bear upon the question, under which action, by the Legislature, can be sheltered and protected. It is insisted, that under what is known as the police power, the Section of the Code can be maintained. This power in the State is one settled and conceded by our Courts, and by standard authors on the subject of Constitutional law, but at the same time, one that is exceedingly difficult to define with precision, so as to include all that is within its scope, and exclude, rigidly, all that is beyond it. Mr. Cooley, in his work on "Constitutional Limitations," page 572, attempts to define this power. He says:

"The police of a State, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order, and to prevent offences against the State, but also to establish for the intercourse of citizen with citizen, those rules of good manners, and good neighborhood, which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with like enjoyment of rights by others."

These generalities may include all that is involved in the power

under consideration, but we are compelled to say, to our minds, lack that definiteness and precision that should be given to the statement of a legal proposition. We do not feel much assisted by it in arriving at the limitations, or extent of the power referred to; a more accurate definition, perhaps, is found on page 573, cited from an opinion by Redfield, which is as follows:

"This police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State. By this general police power of the State, persons and property are subjected to all kind of restraints and burdens, in order to secure the general comfort, health and prosperity of the State."

Without hazarding a definition that shall attempt to include all that fall under this power, we would say, it is the exercise of a power on the part of the Legislature of general regulation of all its citizens, natural or artificial, in subordination to the public interest, but so as not to interfere with or impair the rights of any to the fullest enjoyment of personal liberty, security and property, consistent with like enjoyment of such rights on the part of all others.

However, passing from these general definitions, let us see what is the rule as applicable to rights under a charter contract. The rule is as well stated on this subject, on page 577, as it can probably be found anywhere. After laying down the doctrine that these charters are contracts, and as such, can not be impaired, he says:

"The limit to the exercise of the police in these cases must be this: The regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under pretence of regulation, take from the corporation any of the essential rights which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter, in curtailment of the corporate franchise."

In other words, the true principle is, that the corporation may be subject, like an individual, to regulation, as to the manner of enjoyment of his rights, so as to subordinate his enjoyment of them to the interest of the general public; but this must be so done as to leave his corporate privilege intact, not lessened or impaired in value. Regulation in its enjoyment is the rule, the enjoyment of the right being always implied. Regulation, not

deprivation, is the principle that underlies all the cases on this question.

We need but apply this rule to the case before us to see that the Section of the Code as applicable to companies having charters fixing the right to charge in particular cases, and the amount of such charges can not be sustained as to any such specified charter right. By the charter a two-wheeled carriage is subject to a toll of  $12\frac{1}{2}$  cents. No exception is made in favor of such vehicles when going to mill or anywhere else. The Section, if applied to such companies, would deprive them of this right in all cases where the parties were on any of the missions referred to in it. This is not to regulate, but to deprive; not to say how a thing may be enjoyed, but to say in these cases it shall not be enjoyed at all. This is to take from the corporation a privilege clearly granted, and not regulate its use. And this we hold is forbidden by the Constitution of the United States, as impairing the obligation of the contract.

We need not answer the argument, very ingeniously and forcibly put by the counsel, that the company took the charter, subject, by fair implication, to such regulation as might be deemed proper for the public good. We concede the principle to be sound, so far as regulation is concerned, but it does not include, nor can not include the case before us, of entire deprivation of a granted right. This would be to accept a grant of a privilege, with the understanding that it is to be revoked by the power granting it whenever it deemed the public interest demanded it. Such revocation of essential rights must always be provided for by the contract itself, by general law, or by the Constitution of the State before the passage of the Act of incorporation, or else the corporate rights must remain inviolate.

We have not cited cases in support of the views above laid down, as they are generally familiar to the profession. The cases holding that "Shun Pikes" could not be established, so as to avoid paying tolls at turnpike gates, in our State, go on the same principle we have announced. It is, that the company shall not, by any device or regulation, be deprived of what tolls their charters have given them the right to receive.

The judgment convicting the party must be reversed, and the case remanded for a new trial.

# General Legal Information.

CONDUCTED BY  
JAMES C. BRADFORD,  
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List of Journals from which Abstracts are taken :

NAME.	ABBREVIATION.	ADDRESS.	PUBLISHED.	PRICE.
Albany Law Journal	Alb. L. J.	Albany, N. Y.	Weekly.	15 cents.
American Law Record.	Am. L. Rec.	Philadelphia Pa.	Monthly,	50 cents.
Central Law Journal.	C. L. J.	St. Louis, Mo.	Weekly.	50 cents.
Chicago Legal News.	C. L. N.	Chicago, Ill.	Weekly.	10 cents.
Copp's Land Owner.	C. L. O.	Washington, D. C.	Monthly.	20 cents.
Memphis Law Journal.	M. L. J.	Memphis, Tenn.	Quarterly.	1 dollar.
Pittsburg Legal Journal.	P. L. J.	Pittsburg, Penn.	Weekly.	10 cents.
The Reporter.	The Rep.	Boston, Mass.	Weekly.	25 cents.
The Texas Law Journal.	Tex. L. J.	Tyler, Tex.	Weekly.	15 cents.
Washington Law Re- porter.	Wash. L. R.	Washington, D.C.	Weekly.	10 cents.
Weekly Notes of Cases.	W. N. C.	Philadelphia, Pa.	Weekly.	20 cents.
Western Jurist.	West. Jur.	Des Moines, Ia.	Monthly.	50 cents.

## ABSTRACTS OF DECISIONS OF THE SUPREME COURT OF TENNESSEE.

By R. L. MORRIS, of the Nashville Bar.

### SUSPENSION OF GENERAL LAWS FOR INDIVIDUAL BENEFIT—UNCONSTITUTIONAL.

While municipal corporations in some sense are public bodies, and have powers conferred on them which appertain to the sovereignty of the State, yet when they become suitors, or are such in our Courts, they stand as legal entities—individuals created by law. In this aspect they must be governed by the general law of the land, and can not have any general law suspended for their benefit, nor any law passed for their benefit inconsistent with the general laws of the land—Con., Art. 11, Sec. 8—whereupon the Act of 1875, which authorizes cities having a population of 35,000 or more, by the census of 1870, to institute suits

without giving bond for costs, etc., is unconstitutional and void.—City of Memphis v. Fisher, Jackson, May 13, 1877.

### STATUTE OF LIMITATIONS—A DEVISE OF LANDS GENERALLY NOT A TRUST—CONFLICT OF LAWS—STATUTES OF TENNESSEE GOVERN ON PETITION TO RE-HEAR.

The doctrine that a direction in a will to sell specific lands to pay debts generally, does not create a trust and prevent the operation of the statute of limitations, is re-affirmed.—Hubbard, Ex'r, v. Wm. J. Epps *et al.*

#### PER CURIAM.

Another question has been presented. The testatrix was a resident of Virginia, where she died, and her will was made and probated there, and it appears that all the creditors who have appeared are citizens of Virginia. It has been submitted that the estate here should be distributed according to the law of Virginia, where it is said the

claim of Epps would not be barred, or the fund should be transmitted to the principal administrator in Virginia. This bill is filed by Hubbard as personal representative in this State. The statutes in this State in his favor, we suppose, must apply as to all creditors, no matter where they reside.—*Id.*

#### VOID PROCESS—MOTION AGAINST SHERIFF

A venditioni exponas which issued, commanding the sheriff to sell land, when the legal advertisement of twenty days could not be made before the return day, is void, and the sheriff is not liable to a motion for a "non-return" or "insufficient return."—*Sawyer v. Griggs et al.*, Jackson, June 9, 1877.

#### TESTAMENTARY TRUSTEES—BOND.

Testamentary trustees are not governed by the provisions of the Code, Sec. 1974. *et seq.*, in regard to giving bond filling inventories, etc.—*Kerr, by, etc., v. White*, Jackson, April 28, 1877.

#### TESTAMENTARY TRUST—COURT OF EQUITY

Before a Court of Equity will interfere with the execution of a testamentary trust by a trustee, some danger from the misconduct or incapacity of the trustee must be shown, or at least apprehended, with good cause.—*Id.*

#### RAILROAD—MORTGAGE OF FUTURE ACQUISITIONS.

A mortgage by a railroad of property owned "or which it may hereafter acquire by purchase or otherwise," is valid.—*Buck & Co. v. Memphis & Little Rock R. R. Co.*, Jackson, April, 1877.

#### NET EARNINGS—ANTECEDENT DEBTS.

Where the mortgage makes no provision for antecedent debts, but the net profits are pledged for, the payment of the mortgage debt and accruing interest the antecedent debtor can not subject the earnings of the company in the hands of a third party to the payment of his debt. The mortgagor's right to the net earnings attaches by virtue of his deed and not delivery, nor is his right, as against an antecedent or subsequent creditor, postponed to an ascertainment of what is the net profit or balance. This holding is not in conflict with that of the Court in 6 Hols., 431.—*Id.*

#### RES ADJUDICATA—CLERICAL ERROR.

The fact that a petition for a writ of error contains the

*Trigg*, the name of another defendant in the cause, where in truth it was filed by Mary E. Trigg, and it so appears to the Court, is of no avail against a plea of *res adjudicata*.—*Nelson, Ex., v. Trigg et al.*, Jackson, May 5, 1877.

#### OPINION—DECREE.

Nor is it material that the matter decreed upon Mary E. Trigg was not noticed in the written opinion of the Court.—*Id.*

#### INTENDMENT IN FAVOR OF JURISDICTION—ABSENCE OF WRIT AND BOND.

Nor is there any thing in the objection that no bond is found or writ actually issued, the jurisdiction of the Court would not be defeated by the absence of such writ or bond. It is enough if it appears satisfactory from the record that the writ was awarded and the cause heard. When this appears every intendment must be made in favor of the jurisdiction. When a party has, in fact, had his day in Court, it is not the policy of the law to defeat the effect of the judgment or decree rendered upon a clerical mistake.—*Id.*

#### APPLICATION OF PAYMENTS.

Unless otherwise directed, the creditor may apply payments made by the debtor to unsecured rather than secured debts.—*Id.*

#### SALE OF LAND BY DEVISEE—DOWER.

A sale by a devisee of land pending the bill of the executor to sell lands and pay debts, is invalid against the decree of the Court ordering a sale; nor is the widow of a devisee entitled to dower out of the land necessary to pay debts of the estate.—*Id.*

#### STATE TAX ON STOCKS OF NON-RESIDENTS.

We have been urged, in view of the largely increased interest involved, growing out of the increased number of corporations in the State, to reconsider the question whether the Legislature has the power to levy a tax upon shares of stocks in a corporation held and owned by non-residents, decided in the case of the Union Bank v. The State, 9 Yerg., 490. \* \* \* We hold that the general rule on this question must remain as settled in that case. Such shares are personal property, and follow the residence of the owner. We do not doubt that a different character may be given to shares, either by such provisions in the charter or by general provisions of law in force



at the time, so as to be fairly regarded as part of the charter, they would then become part of the contract, and attach to the stock and fix its character. But such legislation has been had, except as to the share of national banks, by the laws of Congress.—*Frankland v. Morris*, June 2, 1877.

#### SUBROGATION—INTENTION.

The heirs of an estate, on the assumption that it was solvent, paid off certain mortgages on lands; subsequently, on discovering their mistake, they claim to be subrogated to the rights of the mortgagors against the lands. Held, that if the facts and circumstances show definitely that at the time of payment such right was not intended to be exercised, or could not be exercised without injustice to others, then no such right can be held to exist. They can not claim benefit of subrogation by any *ex post facto* intention, wish or interest growing out of subsequent wants. The right and intention must both concur to make a case of subrogation.—*Belcher, Adm'r, v. Wickersham et al.*, Jackson. 1877.

#### PER CURIAM.

We held at the last term, in the case of *Bryant v. Campbell*, that by statute suggestion of insolvency can alone be made in the County Court.—*Id.*

#### PARTIES—BINDING DECREE.

But treating the suggestion as a nullity, under a bill for the administration of a complicated estate, with all parties in interest before the Court, they will be bound by a decree apportioning the fund among them upon principles of equality.—*Id.*

#### PARTNERSHIP LIABILITY.

The fact that property purchased afterwards becomes partnership property, does not make the firm liable to pay for same. The purchase must have been made on account of the firm, and the partnership must be in the purchase, and not alone in the ownership, to make the firm liable.—*McGar v. Drake*, Nashville, Dec. 15, 1877.

### THE LAW CREATING HOMESTEAD.

BY L. TILLMAN, JR.

The common law has no interest or estate analogous to the homestead right, now so generally recognized in the States of the Union. The whole system is the creation of statutes and of very recent origin, scarcely two-score of years having elapsed since the first statute was enacted.\*

In Tennessee the homestead began with the Act of 21st of February, 1852,† in substance carried into the Code of '58, § 2114, *et seq.* Under this Act a housekeeper or head of a family could entitle himself or herself to a homestead of the value of \$500 by making a declaration or intention to claim the same and having the said declaration registered in the county where the land was situated. Protection to the homestead from levy of attachment or execution dated only from the registration—or rather the homestead began with that date. This exemption could not be claimed against levies made or debts contracted before the registration of the intention.‡

Strange as it may seem, few persons took the trouble, small as it was, to place themselves in a condition to claim the benefit of the statute, and this fact explains why so little litigation involving the construction of that law sprung up.

On the 8th day of March, 1868, Section 2114 of the Code was amended so as to extend the homestead right to leasehold estates to more than two, and not exceeding fifteen years.¶

Subsequently, by the Act of March 12, 1868, (Acts 1867-8, ch. 85,) the old law was changed in two important particulars, to-wit: (1) The value of the homestead was increased from \$500 to \$1,000; and (2) The head of the family was not required to register his declaration of intention to claim its benefits. And it was further provided that the exemption might be claimed in equities as well as legal estates.

But in other respects the law stood as it had been, and remained in force un-

\* 1 Wash. on Real Prop., §26-7.

† Acts 1851-2, chap. 162.

‡ *Adkins v. Scales*, from Giles county, Nashville, 187-, MSS.

¶ Act 186-7, ch. 36-41.

til repealed by the Act of June 27th, 1870, passed to enforce the provision of the Constitution relative to homestead. (Art. xi, Sec. 11.) But this Act, while repealing, does by its first and second Sections, re-enact the substance of the former Act, with some modifications not material now to be noticed; so that from the 12th of March, 1868, a homestead of the value of \$1,000 has been exempt in favor of persons coming within the provisions of the law.\*

It was the purpose of the Act of June, 1870, to repeal all the old law on the subject of homestead, as is clearly seen from Section 9; but the amendment to Section 2114 of the Code (which extended the homestead exemption to leasehold estates) is not covered by the language of the repealing Section. As all the law which was in force at the time of the said amendment, including the amended Section, was repealed, it can not be that the amendment alone could stand and form a part of the new law.†

It would be more reasonable to hold that the said amendment became a PART of the amended Section, and was repealed with that Section by the Act aforesaid.

The provision of the Constitution, and the Act of 1870, which we have noticed, contain the Homestead Law of Tennessee, as it now stands. But it must be remembered that the homestead exemption dates from the Act of 1868.

#### § 2—THE NATURE AND CHARACTER OF THE HOMESTEAD EXEMPTION.

A homestead in law means a home place, or place of the home; but when it is sought to define the nature and character of the property or estate which one has in the homestead, and what rights and duties are attached to the same, the task becomes difficult, and little more can be done than borrow the language of the Statutes, and of the Courts in construing them.‡

\* *Deatherage v. Walker*, MSS. (Com. and Legal Rep., 1874); *Kennedy v. Stacy*, 1 Baxter, 220.

† The said amendment, however, was brought forward by Messrs. Thompson & Steger, into their compilation of the Statutes, (§§ 2113a, 2113b,) and Chancellor Cooper, in *Brien ex parte*, (2 Tenn., ch. 37), refers to the same as being the law.

‡ 1 Wash., on Real Prop., 326, 346.

In looking to the law creating the homestead in this State there is much which inclines to the view that a *new estate* was intended, which should vest successively in the husband, wife, widow and minor children. Section 5, of the Act of June, 1870, (Code, 2118a,) provides that the certificate of the freeholders, who under Section 3, (Code, 2116a,) should set apart the homestead, should be registered in the county in which the lands lie; "and when so registered," the language is, "it shall vest in the head of the family and his widow and minor children, as herein provided, a good and valid title to the land, exempt from execution." And it would seem that Section 2119a, when it speaks of the manner in which the homestead should descend, and be finally disposed of, has reference to the *title* of the property. The prohibition against the alienation of the property without the joint consent of husband and wife, when that relation exists, has the appearance of giving to the wife some sort of estate in the land. And then we find our Supreme Court saying:

"The wife is recognized as having a present, subsisting and continuing interest in the maintenance and preservation of the benefits of their possession, and that she has such a *right in the land*, connected with the right of possession, that when that right is violated, she is entitled to claim the protection of the Courts."<sup>\*</sup>

But notwithstanding the strong language, it is now definitely settled that the law does not *alter* or *enlarge* the title of the head of the family to the land in which the homestead is secured. That, whether legal or equitable, remains in the head of the family during life, unless alienated in the manner prescribed by the Constitution and Statute.†

The manifest intention of the law was to protect the husband, or head of the family, and wife and minor children in the *possession and enjoyment* of the homestead. A careful consideration of the Statute itself reveals the fact that the Legislature, notwithstanding the confusion sometimes created by the terms and language used, regarded the title to the homestead

\* *Williams v. Williams*, Legal Reporter, February, 1878.

† *Hicks v. Pepper*, 1 Baxter, 42.

property as all the while remaining in the head of the family.

The homestead right, then, is not an estate in the land—an interest in the title—but it is “a mere exemption;” \* yet it can not be denied that many of the incidents of an estate must be considered as attaching to it.

We can but observe here that, in our judgment, a clearer view of our subject would have resulted, if our Courts had always been careful to preserve in their language the distinction between the homestead right and the homestead. The homestead is the “home place”—the land to which the right attaches. The right is the possession and enjoyment of the land. And when the law says that the homestead shall not be the subject of sale under legal process, or that it shall not be alienated without the joint consent of husband and wife, where that relation exists; and when our Supreme Court say that the “property” can not be alienated except in the manner prescribed by the Constitution, we must understand the meaning to be that the land wherein the homestead right is secured can not be sold under legal process, or by the husband alone, (when he has a wife) so as to deprive those entitled of the possession and enjoyment of the homestead. When it is said that the homestead is exempt, the meaning is that the homestead right can not be reached and affected by execution or judgment. The Courts have not gone so far yet, but these positions necessarily follow, as we think, from the holding that the title of the head of the family in the homestead property remains in him unaltered, “a,” and that the

homestead right itself may be lost by abandonment of the homestead.

### § 3—WHO ENTITLED TO THE EXEMPTION.

The language of the provision of the Constitution, and the Act passed to enforce it, seems clearly to make the words “head of a family” the equivalent of “husband,” through whom the homestead right would enure to the wife and children—the family. The only thing found, which could imply otherwise, is the wording of Section 3 of the Act, which is: “His or her homestead shall be set apart,” etc., and even here the word “her” might be limited to cases where a widow was entitled to the exemption or right by reason of it being begun in the lifetime of the husband.

But notwithstanding this peculiar phraseology, it is difficult to think that the benefits of homestead were intended to be so limited. There can be no doubt that the phrase “head of a family” would embrace a husband with a wife and children, or a husband with a wife alone; and the language of Section 7 of the Act: “Upon the death of head of a family without widow or minor children,” implies that a widower without minor children might be entitled to the right. But doubtless he must have residing with him some family. Whether a child, or children, more than twenty-one years of age, or a grand-child, or children, or an aged father or mother, or a single or widowed sister, or an invalid brother, living with him and dependent upon him would constitute him the “head of a family,” within the meaning of the law, is yet in this State an open question.

There can hardly be a doubt that upon the death of the wife leaving no children, and no relative residing with and dependent upon the husband, the homestead right would be lost. He could then no more be said to be the “head of a family” than any other unmarried person living alone, and notwithstanding the implication found in the Section of the Act above noticed, it is difficult to see upon what principle a widower, without minor children or dependent relatives residing with him, could be considered the head of a family. The fact that he had once been a married man could not strengthen his claim. The exemption, it would seem, is as clearly conditioned upon the

\* *Neam v. Campbell*, Legal Rep., 28th May, 1877.

“a” Since writing the above we have seen the manuscript opinion in the case of *Carter v. Hattan*, Legal Rep., Feb., 1878, which settles the law according to the view we have taken. In this case the husband sold and conveyed without the wife’s consent, evidenced as required to alienate homestead; the Court said: “The attempted alienation must fail. This rule obtains as to the right of the homestead only. The fee remains (in the purchaser) qualified by the right of occupancy which can not be disturbed while the relation supporting the right of homestead exists.”

claimant remaining the head of a family as that he should have been such in the first instance; unless the party be a widow or minor child, holding and enjoying by virtue of the right having attached in the lifetime of the husband, or father, or head of the family; in which case, it is clear from the Statute, the claimant need not be the head of a family. But a widow or minor child would not be entitled to the right in lands which were never occupied as a homestead by the head of the family. In other words, in cases where the homestead right has attached during the life of the head of the family, it will be continued as to same property to the widow or minor child or children occupying the same; but in all other cases the party to be entitled must be the head of a family.

Would a bachelor with whom a mother or sister, or mother and sisters lived, and for whom he had for years provided, be the head of a family? This question was affirmatively determined by the Supreme Court of Georgia;\* but a bachelor having with him hired servants simply, the same Court say, is not the head of a family within the meaning of the law.†

In California the phrase "head of a family" as used in the Constitution and laws has no reference to the sex of the party,‡ and this seems to be the conclusion in some other States.

In our own State, under the Act of 1833, ch. 80, exempting certain personal property in favor of the "head of a family engaged in agriculture," it was held that a widow who, with her children, lived with her father, on his farm, and in the same house, and assisted in carrying on the farm, by the aid of her sons, was entitled to the benefit of the exemption.†

But so much depends upon the language used in the law creating the exemption, it is impossible to draw any general principles at present from the decisions.

It is obvious, therefore, as Chancellor Cooper has remarked in Brien, *ex parte*,|| that our Courts must construe our Constitution and laws on this subject from their own intrinsic light, with such aid as can be derived from

our own decisions on analogous questions.

#### § 4—IN WHAT ESTATE THE RIGHT MAY BE CLAIMED.

"There is a different rule applied in different States in respect to the nature and extent of property or ownership requisite on the part of the one claiming exemption in the premises in respect to which it is sought to be applied."\*

In some instances the exemption may be claimed in leasehold estates, and in an estate for life, or for years. By the second Section of our Act of 1870, the right is given in both legal and equitable estates; and if the Act of 1866-7, ch. 36, amending Section 2114 of the Code, can be considered as remaining after the repeal of said Section, the right may exist in leasehold estates of more than two, and not exceeding fifteen years.

There can be little doubt that it may be claimed in a life estate.‡ In Brien, *ex parte*, cited above, the learned Chancellor gave the exemption to a widow residing upon her dower land; and our Supreme Court, in Crawford and wife v. Crawford & Thompson,† without considering the question, tacitly recognize the right in such estates, but refuse the relief prayed for in that case, upon the ground that the debt against which the exemption was claimed was contracted in 1867.

It can not matter, as we think, whether the fee in the property occupied as homestead be in the husband or wife; and if this be so, a wife having a separate estate settled upon her for her separate use, could not, under the Act of 1869-70, ch. 99,‡ dispose of such estate, if occupied as a homestead, so as to deprive the husband of the right without his joining in the conveyance. And the husband, if still the head of a family, would be entitled to claim the exemption in any lands occupied by him as tenant by the courtesy.

Whether a head of a family, residing upon lands wherein he held an interest as tenant in common, may claim homestead, is uncertain. In California, Indiana and Massachusetts the exemption is not allowed in lands so

\* Marsh v. Sizenby, 41 Ga., 153.

‡ Calhoun v. McSendon, 42 Ga., 408.

+ 1 Wash., 327.

‡ Buchanan v. Crawford, 3 Hum., 213.

|| 2 Tenn. chy., 33.

\* 1 Wash., 337.

‡ Ibidem.

+ Legal Rep., June, 1877, page 37.

‡ Code, § 2486c.

## GENERAL LEGAL INFORMATION.

held.\* But a different rule prevails in other States. The difficulty in such case must arise from the impossibility of fixing or locating the homestead. As all the tenants in common occupy promiscuously, and "none knoweth his own severalty," where could the homestead be said to rest, or how could it be assigned? A head of a family residing on land owned in common with others, could hardly be considered as occupying his undivided interest.

Certainly if the exemption attaches in such cases it must be a sort of floating right, hovering about the abstract title of the party, rather than fastened to the land which he owns and occupies. It seems to us that the homestead right, from its nature and character, can only be claimed in lands held in severalty. It is of such lands only that possession and enjoyment (the essential features of the exemption) can be distinctly asserted, and from which alone the homestead—a specific tract or parcel of land of the value of \$1,000—may be carved.

It should be observed that the right attaches only to such lands as may be actually occupied by the claimant as a home. Whether in any case the exemption could reach to two separate tracts or lots, must depend upon situation and circumstances. If the head of a family own two lots, lying near each other, but separate, upon both of which are buildings, occupied by members of the family, the homestead right might probably be claimed in both, if the one upon which the head resided was of less value than \$1,000.

### § 5—HOW FAR, AND FROM WHAT DEBTS THE HOMESTEAD IS EXEMPT.

If the right exist in leasehold estates the exemption can not be claimed as against rent due on the premises.†

The homestead of the value of \$1,000 is exempt from all debts contracted since March 12, 1868, except public taxes legally assessed upon it, and "any debt or liability contracted for its purchase, or legally incurred for improvements made thereon, or for any judgment for failure or refusal to work on public roads, or for fines and costs for voting out of the civil district or ward in which the voter lives, or for carrying deadly or concealed weapons contray to law, or for giving away

or selling intoxicating liquors on election days."‡

Act 1870-71, § 5; (Code, § 2111a).

The Act of 1868, as before noticed, first provided this homestead; but by the terms of the Act the exemption could not be claimed against debts contracted before its passage. The Act of June, 1870, though repealing the Act of 1868, did at the same time, in substance, re-enact it; so that the exemption dates from the Act of 1868, and no debt contracted since its passage, unless it be of the kind mentioned in the Statute, can be made from the homestead.† The exemption having all the while existed, no right of any person becoming a creditor since that date is altered or impaired, and hence, there is nothing in the law which is obnoxious to Art. 1, Sec. 10, of the Constitution of the United States, which prevents any State passing any law impairing the obligation of contracts.

The Act of June, 1870, made no reference to pre-existing debts. But such debts would not have been affected in any event, for "such property as was subject to execution at the time the debt was contracted must remain so until the debt is paid."‡

It does not matter when a party may actually acquire a homestead. The exemption begins as soon as the party entitled enters into possession of the land, and then operates against all debts contracted after the date when the homestead right was created. The right to the exemption having existed from the date of the law creating it, the obligation of any contract subsequently entered into, is not impaired by the debtor placing himself in a condition to claim the thing exempted.

The date of the original contract whereunder the liability arose will be looked to. If an account made before March 12, 1868, is closed by note after that date, or if after that date a new note is made in lieu of one executed before, and security taken, the creditor may show the origin of his debt, and he will not be opposed to any exemption.§

\* Act 1870, ch. 80, § 1; (Code, 2114a).

† Kennedy v. Stacy, 1 Baxter, 220.

‡ Hannum v. McInturff, Knoxville, Sept., 1872.

§ Crawford v. Crawford & Thompson, Legal Rep., 37—June, 1877.

\* 1 Wash., 338, and cases there cited.

† Code, T. & S., § 2113b.

We have already, in considering the nature and character of the homestead right, intimated *how far*, or in what respect, the *homestead* (or land wherein the right exists) is exempt. In our view,\* the fee or title of the head of the family is liable for any debt of his contracting, and may be sold under legal process, but the *homestead right* of the parties entitled can not be affected by such sale. This thing which may be sold is the right of property, *jus proprietates*, and not any sort of reversionary or remainder interest, though in some respects similar. The right of possession would accrue to the purchaser upon the termination of the homestead right of the debtor and those entitled under him, just as in the case of the purchaser of a remainder or reversionary interest upon the defeat or termination of the particular estate which supported it.

§ 6—HOW HOMESTEAD ALIENATED, SO AS TO DESTROY EXEMPTION.

In the law as it stood previous to the Constitution of 1870, there was no prohibition against the husband alienating the homestead without the consent of the wife, *unless* the homestead had been set apart, in which case it was necessary for her to join in the conveyance.† But the Constitution, which went into effect on 5th May, 1870,‡ provided that "said property shall not be alienated without the joint consent of the husband and wife, where that relation exists;" and the Legislature provides that such consent must be "evidenced by conveyance duly executed as required by law for married women."

In *Williams v. Williams*,§ the Supreme Court say that "it is now a rule of property, made permanent by the fundamental law, that every head of a family is deprived of the right to alienate the homestead, unless his wife joins in the conveyance." There is other language in the opinion in this case, to which we have before adverted, which seems to consider the wife as having a right or interest in the *land itself*; but the conclusion is, that "the convey-

ance (made by the husband alone) is absolutely void, and communicates no title to the purchaser, so far as it interferes with or abridges the wife's homestead right."

There is no doubt as to the correctness of this conclusion; but we think there was no cloud thrown upon her rights by the deed of the husband, which only passed his right in the property. The bill was premature. Her homestead rights were not endangered. She should have waited until the vendee of her husband sued for possession, or until he obtained a writ of possession, and then she might have enjoined him, and had her rights protected.

It has been determined in several cases that the wife can not be deprived of her right, (the occupation and enjoyment of the homestead,) unless she join in the conveyance. And this, even though she move away from the land with the husband afterwards.\*

But the husband, having no wife, but with minor children, may sell and convey the property, and give possession.† The children in such case have no homestead rights, and the Statute does not prevent the husband conveying the property as he may choose.

As already observed, the exemption is the possession and enjoyment of the homestead, and by a proper construction of the Statute we find nothing which prevents the land itself from being sold by the husband, or under legal process, *subject to the homestead right*. Our decision lead to this also.‡

\**Neam v. Campbell*, Legal Rep., May 28, 1877.

†*Caldwell & Hayes v. Bowman*, Legal Rep., May, 1877.

‡ Notwithstanding we had before us the Legal Reporter of May, 1877, while preparing this article, we did not discover, and were not aware of the decision in *Moore v. Hervey, Jackson*, November, 1876, until reaching this point. It will be found to accord fully with the position we have taken touching the homestead right, and the liability of the homestead (or land) to sale by the husband, or under legal process. The language is: "It is the homestead interest or right to the use and occupation of the premises as a homestead that can not be sold and conveyed by the husband alone, or be subjected to sale by legal process."

\*The manuscript opinion in case of *Moore v. Hervey*, Legal Rep., May, 1877.

†*Kennedy v. Stacy*, MSS.; *Bilbrey v. Poston*, Legal Rep., July, 1877.

‡*Bilbrey v. Poston*, *supra*.

§*Jackson*, April, 1874.

It may be doubted whether a husband, who in the lifetime of his wife conveyed the homestead without her consent given in the manner prescribed by law, could himself, after his wife's decease, be ousted of the homestead right—the possession of the premises—if he remained the head of a family. A conveyance under such circumstances, while effectual to pass the *right of property* would, perhaps, because of the prohibition in the law, be inoperative as to the *homestead right*.

In conveyances where the husband and wife join, no express waiver or release of the homestead right is necessary. All that is required is that the wife should join, and that her acknowledgment should be taken in the manner provided by law for married women.

A deed by the husband alone, embracing premises of greater value than the exemption, would certainly be good as to such excess, and the bargainee would be entitled to have the homestead set apart, and possession given him of the remainder.

There is no restriction upon the power of the husband to dispose of property to which the homestead right has not actually attached, or of property in which the right once existed, but was lost at the time of the conveyance.

While the homestead can not be disposed of so as to destroy its character, without the joint consent of husband and wife, when that relation exists, yet it must not be supposed that the *homestead right*, distinct from the land, is a thing susceptible of sale and purchase. The wife is required to join in the conveyance of the homestead, not because she has an interest in the *title to the land*, but simply to indicate her willingness to surrender the *possession*. This right is *personal*—can only be claimed by those to whom the statute gives it. While, therefore, the *right of property* may be sold without immediately affecting the *right of possession*, yet the last named right can not be disposed of so as to vest it in another.

#### §7. HOW THE RIGHT MAY BE WAIVED OR LOST.

Since the homestead right is made to depend upon actual occupation of the premises, it is a sequence that an abandonment thereof, with a view of making a home elsewhere, is a waiver

of the right. What circumstances may amount to, or be proof of abandonment, can not be stated with any very great certainty. As a general proposition it may be laid down that the acquisition of a new homestead is an abandonment of the former one.

There is a diversity in the rulings of the different States upon this subject. Mr. Washburn, in his work on Real Property (Vol. 1, 372, *et seq.*), has collated a number of the cases and points determined.

In Illinois, where the law creating the exemption is very similar to ours, the right may be lost to the head of a family if he ceases to occupy the premises as a residence, or ceases to have a family.\* Our Supreme Court† hold that a widow to whom the right came upon the death of the husband waives and loses the same by removing with her infant son from Tennessee to Kentucky, and there settling, with no intention of returning. It seems that the minor child had only a contingent right of homestead, and that was lost by the removal with the mother. But in every case the abandonment must be permanent. A temporary absence from the premises would not work a waiver.

If the head of a family, or husband, absconds or leaves his family, the homestead (or homestead right) shall, along with the other property exempt by law, "be set apart for the use of the wife and family, and shall be exempt in the hands of the wife or children, and such property, on the death of the owner, shall be exempt in the hands of the widow and children."‡ We take it that the provisions of the act just given must apply to and embrace the homestead right. The latter part of said section continues: "... shall be exempt in the hands of the widow and children, as prescribed in Sections 2288-2290 of the Code." These sections, it will be seen upon reference thereto, originally applied to personal property, that being the only kind of property exempt. If this homestead right should, upon the death of an absconding husband, pass to the widow and children, and in their hands be exempt, as prescribed in the sections

\*Green v. Marks, 25 Ill., 221.

†In Hicks v. Pepper, *supra*.

‡Act of 1870-71, ch. 7, § 6; Code, § 2112. a.

designated, it would seem that the children would have an immediate and present interest, of which the widow would be powerless to deprive them by any act *in pais*. But construing this act of 1870-71 with that of June, 1870, it will doubtless be considered that the homestead right, in the case supposed, would pass to and be held by the widow and minor children, in the manner provided by Section 6 of the Act of 1870 (Code, 2119 a.)

"If the head of a family is married and his wife obtain a divorce on account of his fault or misconduct, the title to the homestead shall be vested by the decree of the Court granting the divorce in the wife, and after her death it shall pass to their children."\*

Here it is again evident that the Legislature had a confused and erroneous view of the thing or property which by the Constitution and the Act in in which we find this section, had been declared exempt. The title to the homestead itself is here mentioned and intended. But inasmuch as the Legislature did not understand itself, what is said in the section quoted must be made to harmonize with the previous parts of the Act and the construction given to them. And when this is done the section will be received as authorizing the Court in the case given to declare the wife, and, upon her death, their children, entitled to the possession and enjoyment of the homestead. Such right so vested would still be liable to be lost or waived, because its nature would remain the same.

The right is lost or surrendered by a sale and conveyance wherein the wife joins, as prescribed. And also by a sale under legal process for the satisfaction of any debt against which the exemption could not be claimed.

The most difficult question likely to arise under this head of our subject, is whether a wife can waive or lose her right in any way except by joining with the husband in a conveyance in the manner provided. A widow may voluntarily abandon the possession, and her right is gone; and she may take her infant child with her and its "contingent right" is lost.† But as the wife has "a present, subsisting and continuing interest in the maintenance and preservation of the benefits of the

possession," and as the law has provided the manner in which she must give her consent to the surrender of that interest, it seems to follow that she can not do so in any other manner. And hence it is held that she does not lose her right by removing from the premises with her husband, after a sale and conveyance by him in which she did not join;\* or by removing with her husband from the premises before a sale.

If, however, they acquire a new homestead, her right to the old would certainly be gone, even if she gave no consent to the surrender of the first. And this seems to be the only case where her right may be lost without the formal consent required by the law. The right could not exist in two tracts at same time; and as it must exist in the one occupied, it must be lost in the first.

Where a husband abandons his wife and family, leaving them in possession of the homestead, can the wife, so long as she is a wife, and acquires no new homestead of her own, do any act which would operate as a waiver of her right? Since the statute has prescribed the manner in which she shall give her consent, is not every other method excluded? And if a wife in such case, though not occupying the homestead, be entitled to its benefits, what would be the right of the minor children should she die while so situated? If the homestead, under such circumstances, retained its character, would not the minor children be entitled to claim it? A widow, of course, could abandon the homestead and lose its benefits, and being lost to her the contingent right of the minor is also lost. But if in the case mentioned, the wife, by removal, could not affect her right, would her act affect that of the minor?

#### § 8—OF SETTING APART THE HOMESTEAD.

Section 3 of the Act of 1870 (Code 2116a.) provides the manner of setting apart the homestead when the real estate of the head of the family is levied on by execution or attachment. "The officer executing the writs, shall summon three disinterested freeholders not connected with the parties, and administer to them an oath to set apart said homestead out of the real estate so levied on. Said freeholders shall examine the premises, and, upon oath,

\*Sec. 8, Act of 1870 (Code, 2121 a.)

†Hicks v. Pepper, *supra*.

\*Neam v. Campbell, *supra*.



set apart said homestead, including the mansion and outhouses, and set out in writing the boundaries thereof, and certify that such is the homestead set apart by them, and deliver the same to the debtor, and the remainder only of such lands so levied on or attached, shall be subject to sale, which fact shall be returned on the execution."

The officer must summon "*disinterested freeholders*, not connected with the parties, and administer to them an oath," etc. The form or matter of the oath is not prescribed, but doubtless it should be broad enough to insure a faithful and impartial performance of the duty devolved upon them. We suggest the following:

"You and each of you do solemnly swear that you are freeholders of — county; that you are not interested in the matter of controversy now pending in the — Court, (or before Esq., — a Justice of the Peace) of said county, between — plaintiff and — defendant; and that you are not connected with said parties. And you do further swear that you will faithfully and impartially, and in the manner prescribed by law, set apart a homestead to the said defendant, — from his real estate lying in the — district of said county, and upon which an execution (or attachment) issued from said court, was heretofore levied by me. So help you God."

When the freeholders have been qualified they examine the premises and set apart so much of the land levied upon, including the mansion and out-houses, as shall in their judgment be of the value, "in all," of \$1,000. The boundaries of the tract they set apart should be set out in writing. *Their certificate may be in the following form:*

"We, the undersigned, freeholders of — county, unconnected with the parties to a certain controversy now pending in the — Court (or before Esquire — a Justice of the Peace) of said county, between —, plaintiff, and —, defendant, and not interested therein, having been summoned and duly qualified by —, sheriff (or deputy, as the case may be), who holds and has levied an execution (or attachment), issued from said court in said case, upon the real estate of said defendant, —, lying in the — Civil District of said county, Do CERTIFY that we have examined

the premises so levied upon and therefrom we have set apart as the homestead of said —, the following described tract or parcel of land, to-wit: beginning, etc., (giving boundaries), which tract includes the mansion and out-houses, and is, altogether, of the value of \$1,000."

If the entire premises levied upon do not, in the judgment of the freeholders, exceed the value of \$1,000, they so certify.

Upon the certificate of the freeholders the officer having the writ certifies:

"I do certify that the within, or foregoing, is the act and deed of the freeholders summoned and qualified by me to set apart a homestead to —, out of the real estate levied on in the case mentioned in said certificate."

The certificate is then delivered to the debtor, who "shall have the same registered in the Register's office of the county in which the lands lie, and when so registered, it shall vest in the head of the family, and his widow and minor children," as provided by the statute.

When the homestead is thus set apart, the officer having the writ makes sale of the "remainder only of such lands so levied on or attached," and his return should show fully all the facts.\* The boundaries of the tract

\* A difficult question arises here. May the officer, under and by virtue of the execution he holds, and which has been levied on the lands of the debtor, sell not only the lands lying outside the homestead, but the *homestead itself, subject to the homestead right*; and when a levy of an execution from a Justice is made, and homestead set apart, and the return made to the Circuit Court for condemnation, should not that Court order also the sale of the homestead, subject to the right? There can be no question that the lien fixed by the levy rests upon the *whole land*, and in one event (to-wit, where the freeholders find that the homestead can not be set apart) the officer sells the whole. Why may he not sell the whole, in the other case, subject to the *homestead right*, which, by virtue of the action of the freeholders, is drawn off the land as a whole, and made to rest upon a particular parcel? In view of the construction which the statute has received, does it not follow that the

carved out for homestead should be set out. A copy of the freeholder's certificate might be attached and returned with the writ.

When the real estate levied on is found by the freeholders to be of greater value than \$1,000, and so situated that it can not be divided so as to set apart the homestead, they must certify the fact.<sup>a</sup> And then the officer sells the whole tract, "and out of the proceeds he shall pay to the Clerk of the Court rendering the judgment or condemning the land for sale \$1,000, to be by him invested under the order of the Court in the purchase of a homestead for the family of said debtor," and the surplus applied to the payment of the "execution."

But what if some one bids off the land at *less* than \$1,000? Could the officer, of his own motion, refuse to accept the bid? In the absence of any provision in the law for such contingency, his only safe course would be to accept the bid, subject to the action of the Court, and make return of all the facts. The Court could probably declare that there was no sale, and award alias execution. We are left here completely in the dark.

But if sale, in such case, bring more than \$1,000, how will the Court order the investment in a new homestead to be made? Perhaps the parties for whose benefit the purchase must be made might, themselves, select the tract just worth \$1,000, if it could be found. The Court would certainly direct the *title* to be taken to the head of the family.

If, in any case, in Court it appears that any party is entitled to homestead, and that it has not been assigned, commissioners will be appointed and instructed in the premises. If a party be entitled to both homestead and dower, the homestead will be first set apart, and then one-third of the re-

language, "the remainder only of such lands so levied on or attached shall be sold," must be taken as simply prohibiting the sale of the *homestead right* which attaches to the *homestead*, or of the homestead so as to effect the right?

<sup>a</sup> The form of certificate suggested above, may be easily shaped to suit the case. Care should be taken to make it specific and certain.

mainder of the premises will constitute the dower.\*

#### § 9—ENFORCING HOMESTEAD RIGHTS—PRACTICE—PARTIES—FORUM.

In enforcing homestead rights, few questions, if any, will arise in our State as to the mode of procedure and who should be made parties. The husband and wife, when that relation exists, are the only parties who have a present, subsisting interest in the preservation of the benefits of the possession. When their right is endangered or lost by some act not binding upon both, both may join in a bill in Chancery to have their rights declared and protected,<sup>†</sup> or the wife alone, by next friend, may sue.<sup>‡</sup> In such case, the husband should be made defendant. And if a case may arise where the wife owning the fee in the homestead endangers the husband's right by any act to which he was not a party, then he could ask the Court to protect him.

As the children have no such right during the life of the father as prevents him from disposing of the homestead, or the widow mother from abandoning (or selling it, if the fee be in her), no case can be imagined where they would be necessary parties to any proceeding to set up the right during the life of either father or mother. Nor, indeed, during such period, would they be necessary parties to a proceeding brought by a third party to test the right of either father or mother. Of course, in all cases where the father or head of the family owning the fee is dead, and the proceedings may affect the *title* to the homestead, the children or heirs (adult and minor) of such deceased head, must be parties. In any case where a minor would be entitled to the right, he would sue by guardian or next friend.

It seems that Chancery affords the speediest, fullest and, perhaps, only relief to one entitled, and whose right is endangered.

All the reported cases which sought to have the wife's, or husband and wife's, right declared and protected, were instituted in that Court. But in any Court where the right comes in

\* Act of 1873, ch. 98, § 1. *Lovelace v. Lovelace*, LEGAL REPORTER, January, 1878, 281.

† *Kennedy v. Stacy*, *supra*.

‡ *Williams v. Williams*, *supra*.

question, and is set up by the pleadings and established by the proof, it will be protected.

If an officer, having execution from a Justice, should levy and return the same to the Circuit Court, without setting apart the homestead, might not the defendant appear in said court before the condemnation, and ask to have his rights protected? We see no reason why this might not be done, if the return of the sheriff showed that the defendant was in possession. The application would be by petition, would show the right of the party, and pray for the appointment of commissioners to set apart the homestead.

But if the sheriff's return in such case did not show upon its face that defendant was entitled to the right, we think the Circuit Court would not entertain an application. Said Court would presume that the sheriff had performed his duty, and would proceed to condemn the land levied on as shown by the return. The sale would pass the title to the whole, and the party entitled to the homestead right, before ousted of his possession, could have relief by going into Chancery.

A failure on the part of the officer levying to set apart the homestead, would not affect the validity of the levy or sale thereunder. Such sale would certainly pass the title of the land, subject, however, to the homestead right of the defendant therein, which he might afterwards assert in the proper forum; just as in the case where a husband should sell the homestead without the wife joining in the conveyance.

§ 10—LEGISLATION NEEDED.

Considering the numerous questions arising under the law as it stands—especially in the matter of setting apart and making sale of the homestead, subject to the right, etc., would it not be the part of wisdom to have, as soon as practicable, further legislation on this subject?

The whole Act should be remodeled in the light of the construction given by the Courts, and made to speak with clearness and fullness upon the many points, as to which we are now left to conjecture.

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# General Legal Information.

CONDUCTED BY  
JAMES C. BRADFORD,  
OF THE NASHVILLE BAR.

List of Journals from which Abstracts are taken:

NAME.	ABBREVIATION.	ADDRESS.	PUBLISHED.	PRICE.
Albany Law Journal	Alb. L. J.	Albany, N. Y.	Weekly.	15 cents.
American Law Record.	Am. L. Rec.	Philadelphia Pa.	Monthly,	50 cents.
Central Law Journal.	C. L. J.	St. Louis, Mo.	Weekly.	50 cents.
Chicago Legal News.	C. L. N.	Chicago, Ill.	Weekly.	10 cents.
Copp's Land Owner.	C. L. O.	Washington, D. C.	Monthly.	20 cents.
Pittsburg Legal Journal.	P. L. J.	Pittsburg, Penn.	Weekly.	10 cents.
The Law and Equity Reporter.	L. & E. R.	New York, N. Y.	Weekly.	25 cents.
The Texas Law Journal.	Tex. L. J.	Tyler, Tex.	Weekly.	15 cents.
Washington Law Reporter.	Wash. L. R.	Washington, D. C.	Weekly.	10 cents.
Weekly Notes of Cases.	W. N. C.	Philadelphia, Pa.	Weekly.	20 cents.
Western Jurist.	West. Jur.	Des Moines, Ia.	Monthly.	50 cents.

## BOOK NOTICES.

6 & 7 YERGER, Edited by Hon. W. F. Cooper: Geo. I. Jones & Co., St. Louis.

We have received the above books from Messrs. Geo. I. Jones & Co. They are edited in the same manner as the preceding volumes of the Tennessee Reports, and their typographical execution is excellent. Judge Cooper's edition of the Reports commends itself to the profession by the excellence of the plan of the editor, and its great usefulness to the profession. We hope that the enterprise will receive such encouragement from the members of the profession as will hasten its completion.

We have among our advertisements one for the Vanderbilt Law School.

This school opened its third annual session much encouraged by the size of its class. It is patronized by many of the Southern and Western States. The Professors are particularly suited to their respective branches, and nothing is left undone to secure the highest success for the school; coming daily to their lectures fresh from the contests of the bar, they are able to impart to the student practical ideas of the practice and principles of the law. The advantages its location gives are unsurpassed.

## ABSTRACTS.

**ADMINISTRATOR. Personal Liability on Contract.** Where A, being the administrator of B's estate, purchased of C needed provender to feed his intestate's cattle, it was held in an

action by C against A, to charge him personally, that he was so liable. *Tucker v. Whaley*, Sup. Ct. R. I.—[L. & E. R., Dec. 5, 1877.

**ASSIGNMENT. Notice.** A mere promise to pay out of a particular fund, when received, the promiser retaining control over the fund, and no notice being given to the person who is to pay it, does not work an equitable assignment. *Ex parte Tremont Nail Co.*, U. S. Dist. Ct. Mass., Lowell J.—[Cent. L. J., Dec. 7, 1877.

**BANKRUPTCY. Fraudulent Preference.** The Merchants' National Bank of Cincinnati advanced to Homans, who was a banker, on his check, \$10,000, less the usual  $\frac{1}{4}$  per cent. On the afternoon of the same day, Homans placed in an envelope, addressed to the Bank, a note in which he said: A disappointment gives us reason to fear that our check of this date may not be paid. I leave with you the enclosed as security. *Held*, that the securities were transferred with a view to give a fraudulent preference, and that the Bank had reasonable cause to believe that Homans was insolvent when it received and appropriated the securities presented to it. *Merchants National Bank of Cin. v. Cook*, Sup. Ct. U. S.—[Chi. L. N., Dec. 1, 1877.

**Insolvency. Reasonable Cause.**—When the condition of the debtor's affairs are known to be such that prudent business men would conclude that he could not meet his obligations as they matured in the ordinary course of business, there is reasonable cause to believe him to be insolvent; that knowledge is not necessary, nor even a belief, but simply reasonable cause to believe.—*Ibid.*

**Jurisdiction of State Court to Foreclose Mortgage on Bankrupt's Property.** The creditor of a bankrupt, whose debt was secured by mortgage, proved the same against the estate, and

filed a bill in the State Court to foreclose the mortgage. *Held*, that the jurisdiction of the State Courts, for the purpose of foreclosing the mortgage, was not, as to the bankrupt, divested by the bankruptcy proceedings, but the creditor might foreclose in such courts with the law of the bankruptcy court, and the consent of the assignee. *McHenry v. La. Societe Franaise*, Sup. Ct. U. S.—Alb. L. J., Dec. 1, 1877.

**CHARITABLE BEQUEST. Perpetuity.** A testatrix directed a sum to be invested in stock, and the dividends thenceforth to accrue thereon to be applied in having three masses offered up in a certain Catholic Church named, "on each Sunday in the year," for the benefit of her soul and the souls of her relations, the bequests to be entered in the records attached to such Church, so as to insure the fulfillment, at all times, of the objects of said bequests. *Held*, that the bequest was void because the language used in the will made it a perpetuity. *McCour v. Burnett*, Rolls Court (Irish) 11 Irish L. T. R. 130. (This bequest would be held void by the courts both in England and in this country, as a *superstitious use*, under the operations of the statute 1 Edw. VI, c. 14, and under the general policy of the law. *Atty. Gen. v. The Fishmonger's Co.*, 2 Beav. 151; Salk. 162; 5 Russ. 288.—Ed.)

**EASEMENTS.** Plaintiff, by a written instrument, gave defendant a right to lay and maintain across his land a pipe to convey water from a spring. The instrument did not specify the size of the pipe, or where it should be laid. *Held*, that by laying pipe of a particular size across plaintiff's land, defendant fixed the size, and was not entitled thereafter to replace it by pipe of a larger size. *Onthank v. L. S. & M. S. R. R. Co.*, N. Y. Ct. of Appeals.—[Alb. L. J., Dec. 15, 1877.

**FEDERAL COURTS. Removal of Causes.** A petition for the removal of a cause from a State to a Federal Court, under the Act of 1789, must expressly state that the parties were citizens of the respective States *at the time* the suit was commenced. *Phoenix Ins. Co. v. Pechner*, Sup. Ct. U. S.—[Alb. L. J., Dec. 1, 1877.

Under the act of 1867, a petition for removal must state the personal citizenship of the parties; and a State Court is not bound to surrender its jurisdiction upon a petition for removal until at least a petition is filed, which, upon its face, shows the right of the petitioner to transfer it. *Armory v. Armory*, Sup. Ct. U. S.—[Alb. L. J., Dec. 1, 1877.

**INFANCY. Deed. Ratification.** *Held* that a covenant of seizure in a deed by an infant is subject to ratification or confirmation when the infant becomes of age. *Wadhams v. Ivnis*, Cir. Ct. Cook C., Ills.—[Chi. L. N., Dec. 1, 1877.

**LIFE INSURANCE. Conditions in Policies. Waiver.** By conditions in a life insurance policy, the same was to become void in case of failure to pay the regular premium on the day it was due, and also if the insured, without the consent of the company, resided within a certain prohibited district. It was provided, however, that even after the day for the payment of the premium had passed, the company would waive the failure upon being notified that the insured was still in health; and it was customary for an agent of the company to receive premiums after they were due, and his acts in doing so were sanctioned by the company, which furnished him with renewal receipts for the purpose. The agent had, however, no authority to waive the forfeiture arising from residence in the prohibited district. The insured, who

had failed to pay a premium when due, was residing within the prohibited district without consent; was taken sick with yellow fever, of which he shortly after died. While he was sick, his agent called upon the insurance agent and paid the premium, and received a receipt renewing the policy for one year, signed by the company and countersigned by its agent. The agent of the insured was asked nothing about the health of the insured, and said nothing. *Held*, that while the insurance agent would be presumed to have authority to waive the failure to pay the premium when due, he would not be to waive the forfeiture caused by residing in the prohibited district, and the receipt of the premium by him and issue of the renewal receipt would not operate as a waiver. *Globe Mut. Life Ins. Co. v. Wolff*, Sup. Ct. U. S.—[Alb. L. J., Dec. 15, 1877.

**LOST PROPERTY. Who Entitled to.** A bought an old safe, and afterward offered it to B, who refused to purchase it. It was then left with B for sale, with permission to use it while in his possession. B found, between the outer casting and the lining, a roll of bank bills belonging to some persons unknown, whereupon A first demanded the money, and then demanded the safe and its contents as they were when B received them. The safe was returned, but the money retained by B. *Held*, that as against A, B was entitled to retain the money. The finder of lost property is entitled to it as against all the world except the real owner, and ordinarily the place where it is found is of no consequence. *Durfee v. Jones*, Sup. Ct. R. I.—[Alb. L. J., Nov. 24, 1877.

**MEASURE OF DAMAGES. Breach of Warranty.** The measure of damages for breach of the vendor's warranty in sale of personal property is the difference between the actual value of the

article sold, and the value which it would have possessed if it had been as warranted; and the *price paid*, or contracted to be paid, is *merely evidence* of the latter value. *The Aultman & Taylor Co. v. Hellerugton*, Sup. Ct. Wis.—[Chl. L. N., Dec. 8, 1877.]

**MORTGAGE. Subsequent Acquisitions.** A mortgage of personal property, to be subsequently acquired, conveys no title to such property when acquired, which is valid against the mortgager or his voluntary assignee, or subsequent lien creditors by judicial process, unless, after the acquisition, and before subsequent rights and liens attach, possession of the property is given to the mortgagee, or taken by him under the mortgage. *Williams v. Briggs*, Sup. Ct. Rh. I.—[Alb. L. J., 387.]

(Acc. *Phelps et al v. Murray et al.*, 2 Tenn. Ch. R. 746; *Tenn. Nat. Bank v. Ebbert*, 9 Heis. —; *Contra, Brett v. Carter*, 3 Cent. L. J. 286; *Mitchell v. Winslow*, 2 Story, 630.)

#### NOTES.

THE Tennessee Supreme Court Commission, at Memphis, some days since, decided several causes which had been very thoroughly argued, and elicited much interest among gentlemen of the Bar.

In the case of *Kerr v. Gwynn* it was held that an assignment in New York of shares of a National Bank of Tennessee as collateral security for a loan of money made in New York at the time of the assignment, does not vest in the assignee the legal title to the shares so as to protect his claim against the true owner of the stock, until transfer made on the stock book of the bank; although the shares stood, at the time of the assignment in the stock book, in the name of the assignor, and although the certificates assigned were in the name of the assignor, and the assignee had no notice, at or before the assign-

ment, of the right of the real owner of the shares.

The case was as follows: A trustee invested trust funds in the stock of the bank, and took the certificates in his plain name, and when borrowing money from the New York bank for the use of a firm of which he was a partner, handed to the bank, as security for the money borrowed, the stock certificates, with his name subscribed to the usual blank form of assignment, and power of attorney printed on the back of the certificates. Nothing appeared in or on the certificates, or otherwise, indicating that the stock was not the property of the assignor—the borrower of the money. While the stock was thus held by the assignee—the lender of the money—the beneficiaries of the trust fund instituted their proceedings in the court to establish their right to the stock as against the assignee. The principle on which the court decided was that the assignee did not get the legal title, and that the beneficiaries had the prior equity.

**LIMITATION OF ACTIONS—AN OPINION BY JUDGE HENRY G. SMITH.**—A question, seeming to be novel, and of considerable interest to the legal profession in regard to the limitation of actions, was decided, a few days ago, by the Supreme Court Commission at Memphis. The opinion of the court was announced orally by Judge Henry G. Smith, who sat in the stead of Judge L. D. McKissick, who was incompetent because of having been of counsel in the case. The question grew out of the facts substantially as follows: William and Daniel Partin, brothers, were infants, when Davie, claiming under a void decree in chancery, obtained possession of the land in dispute, then belonging to the infant brothers as tenants in common. At the time (1854) Davie went into possession, William was about one year old, and Daniel about three years. William died about one year after the



possession of Davie began, of course without wife, issue, or will, leaving Daniel his heir. Davie continued in possession until and after Daniel came of age. Shortly after coming of age, and within a year, Daniel brought suit for the land against the person in possession, claiming and holding under Davie. No question was made as to the right of Daniel to recover his original share of the land. He was an infant when the adverse possession of Davie began, and his suit was brought in less than three years after his coming of age. The point in dispute was whether, under the first act of limitations of 1819, his suit, which was begun in 1872, was barred by the statute as to the share inherited by him from William. Upon this state of facts, the court held:

First. Under the first section of the Act of 1819 (Code, Section 2,763,) not less than seven years adverse possession of land by a person claiming and holding under an assurance of title in fee simple will vest him with the estate, or protect his possession against the suit of the person having the paramount title; and this, whether the paramount owner be adult or infant at the time the adverse possession began, or whether the heir was adult or infant at the time of descent cast.

Second. If the paramount owner was an infant at the time the adverse possession began, and at the time of his death, and the heir was an infant at the time of the descent cast, such infant heir has, by virtue of the *saving* in favor of persons under disability, only three years after the descent cast within which to sue, although his infancy continued longer than the three years, and although the infant ancestor, had he lived, could not have come of age within the three years: provided, however, as stated in paragraph first above, not less than seven years adverse possession will avail under any circumstances as a defence against the suit of

the paramount owner. Briefly, if the ancestor be an infant at the time of his death, his heir, though an infant, will have, *by virtue of the saving of the statute*, no more than three years after the death within which to sue the adverse possessor. Thus, when the ancestor and heir are both infants during the adverse possession for seven years, such possession may invest the possessor with an indefeasible estate in the land against the paramount title.

For illustration: If the infant owner be one year old at the time the adverse possession begins, and departed life when five years old, his infant heir has no more than three years within which to sue, though the infant heir do not come of age till long after the end of three years.

Third. The difference in this regard between the act of limitations of 1715 and the act of limitations of 1819, (Code, Section 2,763) is this: Under the act of 1715 the saving of the right to sue for three years after the removal of the disability was not given to the heir or devisee. It was given only to the person under disability at the time the adverse possession began, whereas, under the act of 1819, the benefit of the *saving* is given to the heir or devisee of the person under disability when the adverse possession began, and when the disability was removed by his death.

The Court considered the rulings stated above to be supported by the case of Guion v. Bradley, 4th Yerger's reports, as well as by the language of the act of limitations of 1819, and 3 Head, 161.

THE value of a precedent as an authority in the practitioner's favor, or its importance against him, is so often impugned by the assertion that it is a *dictum*, that it becomes important to have a correct estimate of what constitutes a *dictum*. There are three different tests adopted by different classes of

jurists, and between these three every variety and degree of loose motion on this point. The strictest rule considers everything as *dictum* except the narrowest point of law necessarily decisive of the case. The next larger rule is to consider every point that might properly have been decisive of the case, and which was actually presented to the court, and expressly stated by a majority of the court as the ground, or one of several grounds, for its disposition of the case—as an authority for the decision—and consequently everything not so involved, though presented and passed on, as *dictum*. The largest rule is to consider that the authority of the case extends beyond either of these limits to the ratio *decidendi*—the reasons or philosophy of the point or points thus decided.

Which rule should be practically followed depends partly on the relation of the tribunal by which the decision was rendered to the tribunal in which it is cited. The court of last resort may well apply the first and narrowed rule to the opinions of the lower courts, while they, on the other hand, follow, as effectual decisions, incidental and minor rulings of the court of last resort.

A WRITER in an English newspaper thus describes the late Samuel Warren's first appearance at the bar: "I observed, sitting near the witness box, opposite to the judge, a restless Jewish-looking little man, very pale in the face, but with eyebrows exceedingly dark and expressive. He applied a pair of gold hand spectacles to his eyes, looked at the judge, afterward at a portrait of George the Third which hung above the judge, and then quickly removed the spectacles from his nose. They dangled on his chest for an instant, then he put them to his eyes again and inspected the jury on his left. He took the glasses once more from his nose, held them between his finger and thumb, raised them a third

time to his eyes, and looked inquiringly round the court. Such was Samuel Warren, with nothing to do, in his first appearance in the Guild-hall, Newcastle."

THE Chicago *Legal News* of the 6th ult. says: "On Thursday of this week Mrs. J. Ellen Foster, of Clinton, appeared in the Supreme Court of Iowa and argued a liquor suit in appeal, in that tribunal. Her argument was listened to by a large number of the members of the bar and other citizens. The District Court adjourned for the special purpose of allowing the attorneys to hear her argument. It is spoken highly of; she is an able and eloquent speaker. Ten years ago there was not a Supreme Court in the United States where a woman's voice could be heard; to-day there are twelve. In ten years more woman lawyer will stand upon an equality with the man in every court in the land." There are twelve States where women have equal privileges with men in respect to practicing at the bar, but we have yet to hear of a single prominent lawyer among those who have availed themselves of their privileges. In fact, very few women care to follow the profession. As advocates in their own cases they sometimes do remarkably well, witness Myra Clark Gaines and Annie Besant, but they do not display equal ability in dealing with the affairs of others.

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I N D E X  
TO THE  
**LEGAL REPORTER,**  
FOR VOLUME I. ENDING MAY 1, 1878.

PREPARED AND PUBLISHED BY  
**J E R E B A X T E R .**

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**ADMINISTRATOR.**

See Evidence, 5. See Surety, 1. See Decrees, 2. See Insolvency, 1.

1. **JUDGMENT AGAINST**—But *Prima Facie* Evidence of the Estate's Liability. In Suits Against the Heir to Satisfy Ancestor's Debts. Administrator Personally Liable. When.—Judgments against administrators are, at most, but *prima facie* evidence of debts against the estate, which the heir is entitled to contest, and show to be incorrect, in proceedings to subject his land, to the payment of his ancestor's debt, as provided for by Section 2287 of the Code. A judgment confessed contrary to the truth of the case, as understood by the administrator at the time, will only effect him, but can have no weight whatever against the heir.—*W. C. Kyle v. Mary, Robert Kyle et al.* December, 1877, p. 264.
2. **SALE**—When Void. Purchaser's Right under.—In the case of a void sale by an administrator, the purchaser of land at such sale, belonging to the estate, will be substituted only to the rights of the creditors whose debts were paid by his money.
3. **SAME. Same. Waste by Administrator.**—If the administrator has wasted the estate, he and the securities on his bond are liable to the creditors to the extent of the waste, and not the land of the heirs. This is so even if both the administrator and his securities are insolvent.
4. **SAME. Same. Heirs not Security.**—The law does not make the heirs securities for the administrator, nor make their rights dependent upon the integrity or negligence of the administrator.
5. **SAME. Same. Dower.**—When the widow is the administratrix in such case, if she has not claimed any dower interest, and never had any set apart for her, the purchaser will not be entitled to relief out of the land to the extent of dower interest.—*Joe. D. Bennett and Wife, et al., v. John C. Coldwell.* January, 1878, p. 309.
6. **STATUTE of Two Years and Six Months does not run Against Creditor. When.**—If an administrator negotiates for delay, until the happening of a certain pos-

**ADMINISTRATOR—Continued.**

sible event, and obtains it, with or without special verbal request, and the effect of it has been to paralyze the vigilance of the creditor, he will not be entitled to the benefit of the statute by reason of such delay.

**FACTS.**—The administrator sought an interview with the creditor upon the subject of a settlement, remarking to him that he wanted to settle the whole matter, but did not wish to do so until he could settle with another creditor at the same time. The Court say, this was sufficient application for delay, to protect the creditor and save the bar.—*State, for the use, etc., v. Jas. A. Murray, Adm'r.* November, 1877, p. 216.

**AFFIDAVIT.** See Jury, 2 and 3.

**ALIMONY.**

1. **CREDITORS of Husband. Rights of Against Alimony.**—Alimony cannot be assigned to the wife upon granting her a divorce, so as to defeat the claims of the existing creditors of the husband at the time the wife's suit for divorce was commenced.
2. **COURT OF EQUITY. Jurisdiction.**—When real estate, subject to the debts of the husband, has been assigned to the divorced wife for alimony, and she put in possession thereof, a creditor who has recovered judgment against the husband and had execution returned *nulla bona*, may come into equity and have a decree for the sale of the land.
3. **HOMESTEAD.**—The creditor in such case cannot reach the homestead or other property exempt from execution; his rights are only those he might have had against the property in the hands of the husband before the decree for divorce.—*A. J. Powell v. W. J. Warren.* June, 1877, p. 47.

**APPEAL.**—See Execution, 3.

**ASSIGNMENT.**

1. **ASSIGNMENT *Pendente Lite*.** Court Not Bound to Notice.—A Court is not bound to notice an assignment *pendente lite*, and all interests of a complainant, under a decree in his favor, will enure to the benefit of the assignee. A complainant's want of interest in the subject matter, at the rendition of the decree, is not sufficient ground upon which to base a petition for rehearing in behalf of defendant.—*P. B. Wills, et al., v. W. A. Whitmore, et al.* Nov., 1877, p. 222.

**ATTACHMENT.** See Pleading and Practice, 2.

1. **ATTACHING Creditor of Fraudulent Vendee. Not Defeated by Rights of Vendor.** When.—Where a sale of goods is procured by fraud of the vendee, title passes, though it may be subject to the rights of the vendor to avoid the sale. But if a creditor of the vendee attach the goods, before the vendor has taken any steps to avoid the sale, he cannot be deprived of the proceeds arising out of a sale under the attachment, by the vendor.—*Dickson, Clark & Co., v. H Culp, et als.* May, 1877, p. 8.

**ATTORNEY.** See Pleading and Practice, 9.

1. **AUTHORITY OF. His Duty to Client.**—An attorney is not authorized to receive anything but money for his client; and any agreement he may make with his defendant otherwise, is a breach of duty, and not binding on his client.
2. **SERVICES OF WIFE.** Not basis of Consideration.—A husband being entitled to the services of his wife, it is no basis for consideration upon which to support a contract, and all remuneration for such services by the husband, must be considered as a gift, and void as to creditors, unless registered according to law.

**ATTORNEY—Continued.**

3. **VOLUNTARY Conveyance to Wife Void.** When.—A voluntary conveyance to a wife, is *prima facie* void as to creditors existent at the time, unless it be shown that ample means for the payment of such debt was retained by the husband. *R. Moses, Adm'r, etc., v. Marcieff.* June, 1877, p. 67

**ATTORNEY GENERAL.** See Fees, 2. See Clerks, 1, 2 and 3.

**BANKRUPTCY.** See Chancery, 4, 5 and 6.

1. **DISCHARGE IN.** May be set up by Bill in Chancery against Decree. When.—Bankruptcy proceedings having been instituted before final decree in the Court below, and suggestion thereof made, and the assignee made a party defendant, though the proceedings were not then stayed to await the decision of the Court of Bankruptcy as to a discharge, but decree was afterwards rendered against the bankrupt without noticing the assignee, the bankrupt may, nevertheless, by bill in chancery, set up his discharge against said decree.—*John B. Anderson v. C. E. Reeves, et al.* August 1877, p. 129.

**BASTARDY.**

1. **DEFENDANT Not Entitled to the Benefit of Reasonable Doubt—Bastardy cases** are in the nature of civil redress, although the form of enforcing the remedy is by a State proceeding; notwithstanding this fact, the defendant is not entitled to the benefit of the doctrine of reasonable doubt, applicable in criminal cases.—*James Stovall (col'd) v. The State, for use, etc.* August, 1877, p. 138.

**BIGAMY.** See Criminal Law, 2 and 3.

**BILLS AND NOTES.** See Fraud, 1, 2 and 3. See Vendor's Lien, 1. See Surety, 1, 2 and 3. See Evidence, 11, 12 and 13. See Lien, 3.

1. **BILL OF EXCHANGE.** Demand and Notice. Drawer not Bound by Promise to Pay after Dishonor. When.—Where the drawer of a bill of exchange is discharged by neglect of the endorsee, to give notice of non-payment, no promise to pay will be binding upon him, unless it be shown by satisfactory proof that the subsequent promise was made, with a full knowledge of his discharge. It is wholly immaterial whether his ignorance of release resulted from an ignorance of the law or facts, that removed his liability.
2. **NOTICE.** Of Demand and Protest. Drawer of Bill of Exchange is Entitled to. When.—The drawer of a bill of exchange is entitled to notice of demand and protest, if at the time the bill was drawn he had reasonable grounds to expect its acceptance. Upon the following state of facts, the Court held, he had reasonable grounds: Between the drawer and acceptor there had been a long series of transactions; the acceptors had received from the drawer, at different times, large consignments of cotton; the drawer had, from time to time, drawn upon said cotton; the acceptors had long been in the habit of accepting the drawer's draft; the acceptors had in their possession cotton belonging to the drawer, while the bill of exchange was maturing in their hands, and they had instructions to sell the same to meet the bill.
3. **ACCOMMODATION ACCEPTANCE.** What Constitutes, Not a Matter of Fact for a Jury.—What constitutes an accommodation acceptance is not properly a matter of fact for a jury, but a conclusion of law upon a certain state of facts to be found by the jury. An acceptance under the circumstances of such facts, as stated in the 2d head above, is held, not to be an accommodation acceptance.—*Union Bank v. J. J. Rawlings.* November, 1877, p. 226.

BILLS AND NOTES—*Continued.*

4. **EVIDENCE.** Pleading. Assignment of Note. Proof of Necessary. When.—Where a party sues upon a note that has been assigned to him, it is necessary that he should prove the assignment, if contested, in order to establish his claim to the paper sued on; yet such assignee will not be required to prove the assignment, unless it be denied by plea. If the suit originates in the Circuit Court, the plea should be written; if it originates before a Justice of the Peace, the plea may be oral, either before him or on appeal to the Circuit Court.—*R. J. Blackwell v. Wm. H. Fitzpatrick, Adm'r.* December, 1877, p. 262.
5. **HUSBAND'S Note to Wife to Return to Him.** Public Policy.—The relation of husband and wife is not changed by their separation; and, therefore, a note executed by the husband, payable to a trustee for the wife, in consideration of her return to him, cannot be collected—it is *nudum pactum*, and contravenes public policy.—*Copeland v. Boas.* February, 1878, p. 327.
6. **ORDERS.** Difference Between. And Bills and Notes, Demand and Notice not Necessary.. When.—Orders are not put upon the same footing of bills of exchange, and differ from bills and notes, in that they are not negotiable, and are only *prima facie* evidence of a debt of itself, not sufficient to sustain a recovery without proving a consideration. It is not an extinguishment of the precedent demand, and if an action be brought on the original liability, evidence of demand, protest and notice is not necessary.
7. **NOTICE of viva voce Testimony in Chancery not Necessary.** When.—Under § 4467 *et seq.* of the Code, in trials by jury before the Chancellor, notice of *viva voce* testimony is not necessary.—*Albert Johnson v. Charles Warden.* May, 1877, p. 25.
8. **PROMISSORY NOTE.** Parol. Testimony. Statute of Limitations. New Promise to Third Party. Sufficient When.—The words, "Par Bank Notes," have a fixed signification in commercial parlance, which cannot be varied by parol testimony. Under a replication of a new promise to pay a debt barred by the statute of limitations, evidence of admissions or promises made to a stranger, is only admissible when it appears the debtor intended they should be communicated to the creditor.—*Bachman v. Roller.* February, 1878, p. 336.
9. **PROMISSORY NOTE.** Condition. Default. Whole Sum Due. Waiver. Maker's Rights.—A stipulation in a promissory note, bearing interest payable annually, that upon a failure to pay interest annually the note shall be due, is a provision for the benefit of the payee, which he may waive, and cannot be taken advantage of by the maker of the note.—*Wall v. Marsh,* February 1878, p. 330.
10. **NOTE.** Usury. Pleading and Practice.—When a bill of exchange, bearing 12 per cent. interest from maturity, purports to have been made in Mississippi, where such a stipulation would be valid, the bill will not be void on its face in contracting for usurious interest, and will give the holder *prima facie* right to recover. But it may be shown by proof to be a Tennessee contract, and subject to the interest laws of this State. Such violation releases the debtor from all interest in excess of 6 per cent. simply.
11. **SAME.** Same. Under Sections 1 and 2 of the Act of 1869–70, whether the sum above the legal rate is contracted to be paid before, at the time the note falls due, or after it is due, is equally a contract for a sum of interest above the rate allowed by law, and is usurious.—*Richardson v. Brown & Lyles and Cubbins & Gunn.* March 1878, p. 349.

**BOND.** See Injunction, 1. See Pleading and Practice, 4.

1. **JUSTICE** of the Peace Cannot Extend Time. To Give.—A Justice of the Peace cannot extend time for the purpose of giving bond beyond the time prescribed by law.—*W. G. Poindexter v. W. J. Cannon*. October, 1877, p. 205.

**CERTIORARI.** See Interest on judgment, 1. See Pleading and Practice, 10.

**CHANCERY COURT.** See Almony, 2. See Bills and Notes, 7. See Evidence, 12.

1. **CHANCERY COURT.** Has no power to Protect Parties Possessing Statute Privileges and Franchises. When.—Statement: The banks of the river are owned by different persons, both run a ferry and have the same landing, one with, the other without a license.

*Held*, Land may be appropriated to the use of a public ferry as an easement for the benefit of the public, but a person who runs a ferry, under a license, has no such rights against third persons, who set up an opposition without license, as a Court of Equity can protect by injunction or otherwise.

2. **EVIDENCE.** Records of County Court Are. When.—In Courts of Equity the records of the County Court, when duly certified to and regularly filed as evidence, become such as much as a deposition or any other testimony.—*Leisay v. Delp et al.* December, 1877, p. 275.

3. **CHANCERY JURISDICTION.** Act of 1877.—A Court of Chancery will not entertain jurisdiction under the Act of March 26, 1877, of a purely legal demand brought before it in the mode prescribed for the assertion of equitable rights.—*Joseph Saudek v. Nashville and Hillsboro Turnpike Co.* January, 1878, p. 305.

4. **SAME.** Fraudulent Conveyance. Existing Judgment. Discharge in Bankruptcy.—The provisions of the Bankrupt Act, which vest in the assignee, for the benefit of creditors, all the property and rights of the bankrupt, including property previously conveyed in fraud of creditors, mean only by the latter the right to sue for and recover property thus fraudulently conveyed; and the title to such property does not absolutely pass to the assignee until suit is successfully prosecuted for the purpose of setting aside the conveyance. This right is given the assignee for the benefit of those creditors only who prove their claims and acquire a right to a distribution, but such right is not given the assignee exclusive of all others, unless he assert his claim.

5. Hence, where the assignee has not sued for and recovered the property, a creditor whose debt is not discharged, and who had a valid judgment existing at the date of the discharge in bankruptcy, may maintain a bill to set aside a fraudulent conveyance executed by the bankrupt.

6. The facts being conceded, the conveyance being void as to the complainant, and the property itself being the subject of the litigation, neither the bankrupt nor the fraudulent vendee can complain, as the property is gone from the former, and cannot be a second time recovered from the latter.—*The State v. L. B. Williams*. June, 1877, p. 63.

7. **MISREPRESENTATIONS.** Ground for Relief in Equity. When.—Whether a party misrepresenting a fact, knows it to be false, or made an assertion without knowing it to be true, on which another relies, is immaterial in a Court of Equity. It equally operates a surprise and imposition on the other party, and is ground for relief.

CHANCERY COURT—*Continued.*

8. PLEADING. Answer, Though the Oath is not Waived, Must Stand as an Unsworn Answer. When.—A party's answer, though the oath be not waived, must stand as an unsworn answer when it is not certified to, so as to make the affidavit effective, the prothonotary not showing that he was a Clerk of the Court in which the Justice of the Peace presided, as required by the Code, § 4389, so that the answer but makes an issue.
9. FRAUD. Conspiracy. Statement of Facts.—Canfield & Hull were acquainted—had been together some two weeks—they went together to Chester, when the negotiation commenced. Hull sat by during the trade, and heard all that was said, and remarked that the lots were probably worth the money. He claims to have had no interest in the matter. He seems to have known that the trade was to be made, and to have arranged for his share of the land, transferred to him by Canfield; the deed was directed to be made to him.  
*Held*, That it appears, from a fair preponderance of the proof, that Hull was a party to the misrepresentation and fraud of Canfield; that he took the benefit of the same under circumstances of suspicion, that causes him to stand or fall with his confederate.—*Chester v. Canfield & Hull*. December, 1877, p. 258.
10. CHANCERY SALE. A Purchaser at. Failing to Comply with Terms of Sale. Liable for Deficiency of Re-sale. When.—In order to bind a non-complying purchaser at a Chancery sale for deficiencies consequent upon the inferior bids of a second sale, the decree for the second sale must be at the risk of such prior purchaser, and he is entitled to notice that the re-sale is at his risk, and such notice must be set forth in the decree.—*John P. Sharp, Trustee, etc., v. Jas. A. W. Hess*. May, 1877, p. 23.

CHARGE OF COURT. See Jury, 1.

## CHARTER.

1. POWER to Grant.—The power to grant charters of incorporation, with exemptions from taxation, or other like stipulations, binding upon the State, so that the charter, after acceptance, becomes a contract, and irrevocable, falls properly under the head of legislative power, and such power properly belongs to the legislative department of the State, when there is no special limitation of the powers, as the Legislature possesses inherently all legislative power, and the Constitution is to be construed as limiting or restricting, but not as granting the power.
2. SECTION 28, of Article 2, of the Constitution of 1834 Construed.—Sec. 28, of Art. 2 of the Constitution of 1834, to-wit: "All lands liable to taxation, held by deed, grant or entry, town lots, bank stock, etc., and such other property as the Legislature may, from time to time, deem expedient, shall be taxable," imposes no restriction upon the power of the Legislature to stipulate for total or partial exemptions from taxation in charters of incorporation.
3. EXEMPTION from Taxation in Favor of Railroad. Rights of Third Persons who become Purchasers of the Same.—Where the charter of a railroad company exempts it from taxation, and such road is purchased as a whole, with all the franchises of the old company, the exemption still attaches to the property, especially when the decree of a Court so empowered by the Legislature has settled that all rights and immunities passed, and nothing remained in the old company.—*Knoxville and Ohio Railroad Co. v. J. H. Hicks*. February, 1878, p. 338.



CHARTER—*Continued.*

4. CHARTER. Impairing the Obligation of a Contract. Toll Gates. Police Power of State.—The Act of 1849-50 is not binding on turnpike companies, the charters of which had been passed, accepted, and the company organized under it, before the passage of such Act, when the charter prescribed the rights to take toll of all persons without limitation, etc., the charter being a contract, and as such can not be impaired. The police power of a State cannot afford relief in such case.—*State of Tennessee v. William Martin*. March, 1878, p. 374.

CLERKS. See Fees, 6.

1. ATTORNEY-GENERAL. Motion against Clerks.—In pursuance of his duty under Sec. 3228 of the Code, the District Attorney-General can have his motion against delinquent clerks, at any time until the proper statute of limitations forms a bar.
2. SAME. What Fees Allowed.—The Attorney-General is entitled to a fee of two and a half dollars in each case of failure by clerk to enroll cases determined in his Court.
3. COUNTY LIABLE. For Fees. When.—In cases where execution upon the motion is returned *nulla bona*, the county in which such motion is made is liable for fees of Attorney-General.—*Luke C. Wright, Attorney-General, etc., v. County of Shelby*. July, 1877, p. 101.

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COLLECTOR'S DEED. See Taxes, 5 and 6.

CONFEDERATE MONEY. See Deed, 6.

CONSTITUTION. See Charter, 2.

CONSTITUTION OF 1870. See Homestead, 2.

CONSTITUTIONAL LAW. Act Conferring Legislative Power on Courts Invalid. Clause Separable. When.—The latter clause of § 2, ch. 78, Acts of 1869-70, (§ 3813 d, T. & S. Sta.,) authorizing the Court, in suits by or against executors, etc., to require a party to the suit to testify, confers legislative power on the Courts, and is, therefore, void. But this latter clause being distinct from the preceding, (which contains the general rule of exclusion in such cases,) does not render the whole section invalid.—*Tillman v. Cocke*. February, 1878, p. 334.

CONTRACT. See Attorney, 1, 2 and 3. See Deed, 1 and 2. See Insurance, 1. See Public School, 1 and 2.

CONVEYANCE. See Attorney, 3. See Chancery, 4, 5 and 6. See Fraud, 4 and 5.

1. To SUSTAIN a Voluntary Conveyance. What Necessary.—In order to sustain a voluntary conveyance to a wife or child, the proof must show, not merely a sufficiency of property retained to pay the creditors assailing the conveyance, but that ample property was reserved to pay all existing creditors at the time of the conveyance. The inquiry is limited to the circumstances of the donor at the time of the execution of the conveyance, such debts as he then owed are to be estimated.

2. LIABILITY as Endorser not to be Taken into Account.—Liabilities as an endorser, when there is no evidence that the persons for whom he was liable are unable to pay them, cannot be taken into account.—*D. Weaver, Trustee, for use of Planters Bank of Tennessee, and J. W. Underwood & Co., v. R. B. Hawley, et al.* May, 1877, p. 1.

## CORPORATIONS.

See Charter, 1. See Taxes, 1, 2, 3 and 4. See Charter, 4.

1. **FRANCHISE** of Turnpike Corporation. Jurisdiction of Chancery Court. To Decree Sale of.—The Chancery Court has jurisdiction to subject the road beds, gates, toll-houses, lands on which the houses are situated, and the privilege of charging and collecting tolls, to sale for the satisfaction of debts of the company.—*Jas. T. Gleaves, v. Davidson and Wilson Central Turnpike Co.* September, 1877, p. 156.
2. **MUNICIPAL** Corporations. Power and Means of Collecting Taxes Under Act of 1873, Ch. 102, etc.—The City of Memphis filed a bill under the Act of 1873, Ch. 102, to which objection was made by demurrer; that the bill alleges the lands and lots had been sold for taxes and bid in by the complainant, and points to no defect of title under the proceeding for sale; that according to the allegations of the bill, complainant has acquired a perfect title, and her remedy is by an action of ejectment.  
*Held*, The Act of 1873 gives the Chancery Court jurisdiction to evict persons from land in behalf of a corporation that has bid the same in, at the prices of the taxes due thereon.
3. **SAME.** Same. County Commissioner need not be Party. When.—The power given to the County Commissioner to sue is merely cumulative to that of the corporation already vested by law. It is not necessary that the suit should be brought in his name.
4. **SAME.** Same. Statute of Limitations.—It is not in the power of the corporation to relieve one and impose upon another a burden, and no laches on its part, or that of its officers, can defeat the rights of the public to have collected and rightfully appropriated the public taxes. As against this right, there is nothing of such a character that justice requires an estoppel, or limitation should be asserted.—*City of Memphis v. R. F. Looney et al.* January, 1878, p. 288.

**COSTS.** See Fees, 2.

**COUNTY.** See Clerks, 3.

**COUNTY COMMISSIONER.** See Corporations, 3.

**CRIMINAL LAW.** See Evidence, 6 and 7. See Road, 1.

1. **ASSAULT** and Battery. Justification is Defence to Suit for Damages. When.—If the plaintiff committed the first assault, defendant may show what was done by him was justifiable defence to his person, and he will not be bound to show that he could not have retreated or declined the conflict without danger to his person: the defendant might still be liable, however, if his battery of the plaintiff was excessive.—*Y. P. McLemore v. W. W. Moore.* May, 1877, p. 19.
2. **BIGAMY**, an Attempt to Commit. Indictable.—Where a party attempts to commit bigamy, this is such an offence as is indictable under Section 4630 of the Code.
3. **ARGUENDO.** Same. Offences Against the Person.—Such crimes as are injurious to the person, as contra-distinguished from property, are offences against the person.—*The State v. J. M. Johnson.* February, 1878, p. 324.

CRIMINAL LAW—*Continued.*

4. COPY of Indictment. Prisoner Entitled to. In all Cases. Not Restricted to Capital Cases.—Prisoners in actual confinement are entitled to a copy of the indictment in all criminal prosecutions; this right is not restricted, as would be inferred from Sec. 5209 of the Code, to capital offences. The prisoner can waive the right, and if he does not demand it, such waiver will be implied.—*John Moses v. The State.* August, 1877, p. 139.
5. JUROR. Formed Opinion of. Disqualifies. When.—Although the opinion of a juror be formed upon rumor and not upon hearing facts detailed, yet, if the juror's opinion is so fixed that it must require proof to remove it, he is not impartial, and is incompetent. It is the fact that such opinion or prejudice exists in the juror's mind, that disqualifies him, and not the question whether such opinion is founded upon rational grounds.
6. MAYHEM. Indictment For. Bad. When.—An indictment for mayhem, for cutting off the prosecutor's ear, is bad when it simply charges that the defendant made the assault unlawfully, maliciously and feloniously, but fails to charge that the prosecutor's ear was cut off unlawfully, maliciously, etc.—*Bole Watkins, in Error, v. The State.* May, 1877, p. 10.
7. PRACTICE. Special Judges. Incompetent to Try Cases. When.—In criminal cases, where the regular Judge is incompetent, and the attorneys for both the prisoner and the State agree upon a member of the bar as Special Judge, the entire proceedings, judgment and verdict will be nullities, leaving the case as if no trial whatever was had. The prisoner, not having been in jeopardy, will be remanded for trial *de novo*.
8. SAME. Same. Same.—Where a Judge is incompetent for having been of counsel, it is not grounds for objection that he presided when the indictment was found, and ordered it spread upon the minutes, and was also presiding when the plea of not guilty was filed, these being merely ministerial acts, affecting in nowise the merits of the prisoner's case.—*James Glasgow v. The State.* March, 1878, p. 365.

CROSS BILL. See Pleading, 3.

## CROSS ACTION.

1. MAY be Maintained. When.—Nave sued Harkleroud for balance due as price of mill wheels. The defence was a warranty as to the wheels, and a breach of said warranty.  
*Held*, In such case a party has the right to show damages by way of cross action, arising from breach of warranty, though he had not first tendered back or offered to return the wheels purchased.—*H. Harkleroud, in error, v. John Nave.* December, 1877, p. 277.

CURTESY. See Husband and Wife, 1.

DESCENT. See Illigitimacy, 1.

DECREE. See Execution, 1.

1. DECREES and Judgments of Courts can be Attacked Collaterally. When.—If the decree of a Court for the sale of land be void for failure to show upon its face authority in the Court to make such decree, a collateral attack may be made against the decree to avoid the sale, but the evidence which guided the Court rendering the decree cannot be looked to in such a proceeding.

DECREE—*Continued.*

2. **BILLS to Administer Insolvent Estates.** Must be Filed. When.—A bill to administer an insolvent estate must be filed after the suggestion of insolvency is made according to law.
3. **A BILL to Sell Land.** Defective. When.—A bill for an administrator to sell lands to pay debts is defective, in failing to allege the exhaustion of personal assets, and not setting forth any particular debts as remaining due and unpaid.
4. **PURCHASE Money Under Void Sale. Lien on Land.** When.—Where a sale of land is decreed to an administrator to pay debts which are a charge upon the estate, and said sale is held to be void in a suit by the heirs contesting its validity, the complainants in such litigation must account for all money paid by the purchasers which was appropriated to the discharge of *bona fide* debts, and so much of the purchase money as can be shown to have been thus appropriated, will be declared a lien on the land.
5. **PURCHASERS Under Void Sale.** Entitled to Widow's Dower. When.—In case of a void sale under a decree to an administrator where the widow accepts part of the purchase money as value of her dower, such purchasers will be entitled to have the dower laid off to them, and title vested in them in proportion to the amount paid by each as tenants in common.—*A. G. Campbell, et als., v. Zack Bryant, et als.* August, 1877, p. 134.

## DEED. See Taxes, 5, 6, and 7.

1. **DEED.** Construed to Merely Retain a Lien. When.—A deed of conveyance containing the following clause: "Nevertheless, this deed of conveyance is null and void, and of no effect until all the purchase money is paid, then of full force and effect," is construed to retain merely a lien or mortgage to secure the unpaid purchase money; a non-compliance with the conditions does not avoid it absolutely.
2. **EQUITY.** To Have Relief in Upon an Allegation of Want of Title or Breach of Covenants of Seizin. What Requisite.—A party can have no relief in equity for the alleged breach of the covenant of seizin, or upon an allegation of want of title, no fraud or insolvency being charged, unless a clause in the deed changes its character, from an executed to an executory contract.—*S. H. P. Miskelly v. W. J. Pitts.* October, 1877, p. 207.
3. **STAMPS.** Want of. Does not Affect Deed.—The want of revenue stamps does not affect the validity of a conveyance.
4. **VENDOR's Lien.** Set-Off to. Not Allowed. When. Judgment Lien. Exists. When. And How Long.—An intermediate purchaser of land who has sold, cannot set up a set-off against a vendor's lien. Where the issuance of execution, within twelve months after the affirmance of judgment in the Supreme Court, is obstructed by an injunction or otherwise, the judgment lien still exists for twelve months after the removal of such obstructions, and if execution be issued (not levied or satisfied) contrary to legal prohibitions, it will not operate as a waiver of the judgment lien; while it would subject the party to punishment, it will not affect the legal conveyances of the judgment.
5. **CODE 2326.** Does not Affect Liens Acquired in Lifetime of Insolvent Deceased. Code 2326, this Statute is not intended to affect liens acquired in the lifetime of the insolvent deceased debtor. The act was designed merely to abolish the preference which exists at Common Law, but not to affect any lien acquired in the life-time of deceased.

**DEED**—*Continued.*

6. **CONFEDERATE Money.** Valuable Consideration. When.—Confederate money, voluntarily and understandingly accepted by a vendor, is a valuable consideration, and will support a conveyance of land, or transfer and sale of personalty.—*R. J. Bangess, Executor, et al. v. E. C. Pardee, et al.* July, 1878, p. 87.

**DEMAND AND NOTICE.** See Bills and Notes, 6 and 7. See Bills and Notes, 1.

**DISTRIBUTION.** See Pleading and Practice, 5 and 6.

**DIVORCE.** See Alimony, 1 and 2.

**DOWER.** See Administrator, 5. See Decrees, 5. See Lien, 4. See Homestead, 8. See Homestead, 10.

**EJECTMENT.** See Taxes, 7.

**ESTOPPEL.** See Lien, 2. See Persons under Disability, 3. See Statute of Limitations, 3.

**EVIDENCE.** See Administrator, 1. See Chancery, 2. See Bills and Notes, 7. See Constitutional Law, 1. See Persons under Disability, 3. See Warranty, 1. See Fraud, 5.<sup>1</sup> See Bills and Notes, 4. See Mortgage, 4. See Jury, 2 and 3.

1. **EVIDENCE. Attesting Witnesses to a Will.** Opinion of.—Subscribing witnesses only may give their opinion as to the sanity of testator, without giving their reason.
2. **SAME. Physicians.**—A physician may state his deduction, as matter of professional opinion, from facts stated by others, or observed and stated by himself.
3. **SAME. Other Witnesses.**—Other witnesses must state facts, and upon these facts, *observed by themselves*, they will be permitted to give their opinion, whether upon such facts they believe testator to be of sound or unsound mind. From the state of the testator's mind, to be ascertained from the facts, and not from opinion, the jury is to determine the question whether the testator had capacity to make a will. But whether the particular phase of mental unsoundness deprives a person of testamentary capacity, is a matter for exclusive determination of the Court and jury.
4. **ARGUENDO.**—After all it may be said to be a practice of questionable propriety to permit any witness to bring into the scales his private opinion, even upon facts observed and stated by him as to the testator's sanity.—*Kirkpatrick v. Kirkpatrick.* December, 1877, p. 269.
5. **SUIT Against Administrator. Exception to Testimony.** Mode of.—In a suit against an administrator, in which judgment may be rendered for or against him, the plaintiff is not allowed to testify against the defendant, as to any transaction with or statement by the intestate, unless called to testify thereto by the opposite party, or required to testify thereto by the Court. Code, Section 3813. If testimony contravening the above rule is admitted by the Court, and excepted to by the defendant in these words: "To all which testimony defendant excepted, as being evidence concerning conversations and transactions between witness and deceased." *Held*, the exception was sufficiently explicit and pointed.

How the "requirement to testify" should be made by the Court in any case, is not a settled matter of practice, but the Court sees no objection to the practice of making application to the Court to require the evidence, supported by affidavit, of its materiality in the case.—*Thompson v. Anderson, Adm'r.* June, 1877, p. 44.

EVIDENCE—*Continued.*

6. DYING Declaration. When Incompetent. Because not the whole Conversation.—Witness heard a conversation between deceased and others about the difficulty, but remembered only the "*substance of one expression.*" *Held*, error to allow him to detail the substance of one expression without giving the whole conversation.

When the deceased, in answer to question asked him by witness, made a statement, "and was about to say something more when witness stopped him." *Held*, under the circumstances, it was error to let the statement made go to the jury. The declaration was fragmentary and too incomplete to be received as evidence.

7. GENERAL Character of Deceased. Self-defence.—It is error to permit evidence to go to the jury as to the general character of the deceased for *piety*, and that *he is a member of the Church*. It is not warranted under the rule admitting evidence of the character of deceased for *peaceableness*. The Court charged the jury, "if you find the defendant Richard, upon learning that the deceased, together with Vinson, was coming toward his mother's house, and that they were either armed or unarmed, and thereupon defendant armed himself with a deadly weapon, and advanced towards the deceased as far as his mother's gate, and stationed himself there to await the coming of deceased, with the view and intent of engaging in deadly combat with deceased, provided deceased should assault him with a deadly weapon; and thereupon the deceased advanced near the gate, and either did or did not assault the defendant, and thereupon the defendant shot and killed the deceased, he is guilty of murder." *Held*, this charge calculated to mislead the jury.

The charge should have been: "If the defendant advanced to the gate, determined or intending not to fight, unless for his defence and protection, and a violent and dangerous assault was made upon him, which threatened him with death or great bodily harm without his seeking or provoking it, and he killed his adversary to prevent his own death, or save him from great bodily harm, it would be killing in self-defence."—*Richard Fitzgerald v. The State of Tennessee*. June, 1877, p. 53.

8. TESTIMONY. Objections To. Must be Made. When.—A party cannot, either in a civil or criminal suit, sit by without objecting to testimony, take his chances of acquittal or conviction, upon evidence deemed incompetent, and then ask a reversal for such testimony.
9. WITNESSES. Under Subpoena by the State. Must be Summoned. By Defendant. When.—The State is not bound to introduce any witness, however important, but if defendant wishes the testimony of a witness summoned by the State he must subpoena him, or call him as a witness himself, and cannot complain if the State fails to furnish testimony for his defence.
10. OBJECTIONS. To Jurors. Must be Made. When.—A defendant cannot remain quiet, and by his conduct accept a juror, after an objection comes to his knowledge, especially when the fact is known before the jury is made up, or trial commenced, and then have a new trial when verdict is found against him.—*Cantrell v. The State*. October, 1877, p. 193.
11. WHETHER Claims Taken by Creditors are Received as Security or in Satisfaction of the Debt, is a Question of Fact.—When a creditor takes notes or claims from his debtors, the question whether such claims were taken as a security simply, or accepted in absolute satisfaction of the debt, is one of fact.



**EVIDENCE—Continued.**

12. **ARGUENDO.** Misrepresentations of Facts. Ground for Relief in Equity. When.—A misrepresentation of facts, whether with or without knowledge of their falsity, upon which a party is induced to act, is as conclusive a ground in equity for relief as an assertion wilfully false.
13. **ARGUENDO.** Misrepresentations. Where Subject Open to both parties. Not fraud. When.—In a transaction where the subject is equally open to both parties, neither party is presumed to trust the other, but to rely on his own judgment, and if it be a matter of law, it does not constitute fraud, because the law is presumed to be equally in the knowledge of both parties, where the facts are known, and there is no special confidence or trust violated.—*J. N. Oliver, et al. v. W. McLean, et al.* September, 1877, p. 143.

**EXECUTION.**

1. **VARIANCE** in Recitals. Does not Avoid Sale. When.—An execution issuing upon a judgment, and conforming to it in all essential respects, a variance of the initial letter of the middle name in the execution from that in the judgment, is not so material as to render a sale under it void.
- SALE.** Division of Land. In a sale of land by execution, it is not the duty of the Sheriff, nor has he the right himself to divide the land, and sell it in parcels, no matter what amount of the debt, or the value or amount of land levied upon. It is otherwise where the levy is upon two or more distinct lots of land.
2. **IN VIEW** of the Code.—Sections 2154, 3043, giving to the defendant the right to divide his land, and cause a sale by plat, the rule as laid down in *Tiernan v. Wilson*, 6 John. Ch. R. 411, has no application in Tennessee.
3. **FINAL Decree.** Appeal.—A decree of July 18th, 1871, declared complainant's right to redeem by tender of the money under an amended bill to be thereafter filled; the penalty for a failure to do so within thirty days thereafter being a dismissal of the case out of Court, each party to pay his own costs. A decree of March 5th, 1872, under the amended bill, finally determined the rights of the parties. An appeal from this decree carried up the whole case and all questions involved in it.—*Annie L. Jones, et al. v. D. H. Townsend, and D. H. Townsend v. Annie L. Jones, et al.* October, 1877, p. 179.

**EXECUTOR.** See Constitutional Laws, 1. See Wills, 1.

**EXEMPTION.** See Supersedeas, 3.

**EXPERTS.** See Evidence, 2, 3 and 4.

**ESTOPPEL.**

1. **EXPRESSED** Opinions of Law. No Estoppel. When.—If a party presents facts correctly in his bill, and expresses an erroneous opinion as to a conclusion of law upon the facts thus stated, he is not estopped thereby from having the correct judgment of the law upon the admitted facts.
2. **VENDOR'S** Lien. Does not Exist Against Intervening Equities. When.—When a purchaser of land conveys another tract to his vendor in payment of the purchase money, and title to the last conveyed property fails, the vendor having accepted this conveyance from his vendee in full payment, must look to the covenants of warranty in the last conveyance for his indemnity; and he cannot, when other equities have intervened, set up lien upon the property conveyed on account of failure of title to property transferred to him. The principle is, that where a lien has been expressly retained to a specified extent, it is equivalent to a waiver of that lien to any greater extent.—*James M. Murrell, et al., v. Watson, et al.* July, 1877, p. 79.

**FEDERAL COURT.** See Jurisdiction, 1, 2 and 3.

**FEES.** See Clerks, 2 and 3.

1. **ATTORNEYS' FEES. Lien For. Enforced. How.**—The duty of the Courts is to declare a lien for attorneys' fees, where the amount of the fee is not fixed by contract, and parties are under no disability, and leave the attorney to enforce this lien by appropriate proceedings in a Court having jurisdiction of the question.—*Steel v. Chester*. October, 1877, p. 211.
2. **THE Attorney-General's Fee only \$2 50. When.**—Previous to the Act of 1875, the District Attorney-General is allowed a fee of \$5 00 in misdemeanors, where the costs were paid or secured by the defendants, but in no case where the county pays the costs in a misdemeanor was a fee of more than \$2 50 allowed. The Act of 1875, provided for defendants being compelled to work out the costs, when they failed otherwise to pay or secure them. By the 11th Section, it is provided, that the county shall pay all the costs in misdemeanor cases, as now, and the proceeds of said convict's labor shall be paid into the County Treasury. Though the Attorney-General be entitled to a fee of \$5 00, where the convict pays or secures the costs, and though the convict reimburses the county with the proceeds of his labor, and thereby indirectly pays the cost of his trial, yet the Court hold, the Attorney-General is entitled to a fee of only \$2 50, under the partial provision of Section 4515 of the Code, and the convict cannot be compelled to "work out" any greater amount.
3. **THE Convict Bound only for State Costs.**—Although the defendant be liable to judgment for his own costs, he cannot be held in custody until he pay or secure the same; he is only bound for costs on behalf of the State.
4. **CHAPTER 83 of Act of 1875. Void.**—The Act of 1875, Chapter 83, which provides that the convict be further held in the work-house, after working out the imprisonment affixed by the jury, and all the costs in the case to work out; "also all the costs which may accrue after conviction for clothing and other necessities," considered by the Court to be in violation of the 8th Section of the Bill of Rights, which declares that no man shall be taken or imprisoned, etc., or deprived of his liberty, but by the judgment of his peers, or the law of the land. This Chapter is held by the Court to be void.—*Henry Knox v. The State*. August, 1877, p. 110.
5. **FORFEITURE of Fees by Officer. When.**—In cases where the Legislature has made the performance of any duty pertaining to an office, a condition upon which fees or salaries are to be paid, the officer is not entitled to demand his fees until such duties are performed.
6. **CLERKS of Circuit Court.**—Clerks of Circuit Courts shall forfeit their costs as provided in Section 5242, and Sub-Sections 6 and 7 of the Code.—*Samuel Maynard v. The State*. July, 1877, p. 100.
7. **WITNESS FEES. When allowed.**—While a witness is not bound to attend after final judgment has been rendered in the case, and incurs no forfeiture for failure; nevertheless, having been originally summoned, he is entitled to prove his attendance without being re-summoned after a new trial granted, or after the cause has been reversed and remanded by the Supreme Court, if he continues to attend on the original subpoena. A witness not summoned, but attending, cannot have his fees taxed in the bill of costs; but the fact that there is no subpoena on file is not conclusive evidence that the witness has not been summoned.—*W. W. Moore v. Young B. McLemore*. June, 1877, p. 42.

**FRANCHISE.** See Chancery, 1.

**FRAUD.** See Attachment, 1. See Chancery, 4, 5 and 6. See Chancery, 9. See Evidence, 12 and 13.

1. **FRAUD and Deceit.** Party Making Representations that Afterwards Become False. Not Liable. When.—Horrigan applied to Thatcher, the cashier of a bank, for information concerning the solvency of Toof, Phillips & Co. Thatcher replied favorably as to their credit, and upon this assurance, plaintiff, from time to time, purchased large amounts of the bills and acceptances of said firm. Eight months later, Toof, Phillips & Co. failed, and plaintiff lost \$2,000 by his investments; thereupon he brought suit against Thatcher and the bank for deceit.

*Held,* An honest statement of a mere opinion, however erroneous as to the solvency or reliability of another, cannot furnish the grounds for an action of this character. A party cannot be held, in such a case, to have given a continuing guaranty against future contingencies, nor to have bound himself to notify the other of what he may well be assumed to be able to discover for himself.

2. **PRINCIPAL and Agent.** Bank not Liable for Acts of Cashier. When.—Answering questions as to the solvency of parties, is no part of the business of a cashier of a bank, nor fairly included within the scope of such business. It may be, and probably is, an incident of such position, but not an incident to it.

*Held,* No liability attaches to the bank in such case.

3. **BILLS and Notes.** Guarantor Released by Conduct of Holder. When.—When the holder of paper has given credit to a third party upon the recommendation of a cashier of a bank, and the debtor is ready and offers to pay the note at maturity, and the holder instructs the cashier to give the debtor an extension of time, which the debtor accepts, and then fails, the cashier, though he had rendered himself liable by his recommendation, is discharged by the release of the holder.—*L. B. Horrigan, in error, v. First National Bank and W. W. Thatcher.* December, 1877, p. 253.

4. **FRAUDULENT Conveyance.** Voluntary Conveyance of Property in Fraud of Creditors.—Norvell, Boone & Co., of Memphis, obtained credit from Brady & Co., in New Orleans, through one of their members (McKean), upon the faith of his individual estate, which he promised should remain in his own name, and be subject to his debts; but soon afterwards McKean made a voluntary conveyance of his property, when his firm was in doubtful circumstances, without warning Brady & Co., who continued the credit previously obtained.

*Held,* Such a conveyance is evidence of fraud, in fact, and the registration of the deed does not alter the case. The property so conveyed will be liable to the satisfaction of debts due such creditor, though contracted subsequent to the conveyance. A debtor has no right to convey all of his tangible property, and leave his creditors to take their chances of realizing their debts from assets, consisting of bills and accounts payable, where the proof fails to show that such assets were available to creditors. As the deed is void for fraud, in fact, all the creditors will be allowed to share the proceeds.

5. **SAME.** Same. Payment of Debts. Does not Rebut Evidence of Fraud: When.—Where a debtor makes a voluntary conveyance, and afterwards pays a large part of his liabilities, this does not rebut the evidence of fraud.—

FRAUD—*Continued.*

*L. Levering, et al., v. L. C. Norvell, et al., and M. B. Brady & Co. v. L. C. Norvell, et al.* December, 1877, p. 247.

## GARNISHMENT.

1. ANSWER of Garnishee. Conclusive When. And as to Whom.—The answer of a garnishee, in cases involving more than \$50 00, is conclusive as between garnishee and garnishor *only*, and not as to *strangers* to the litigation; and unless it appear to the Court that the effects or money in the hands of the garnishee are *liable* to the plaintiff's debt, the garnishee will be discharged.—*J. H. Smith v. Lucien B. Leonard.* June, 1877, p. 40.

## GRAND JURY.

PREVIOUS Opinion of Grand Juror. Does not Disqualify.—The foreman of the Grand Jury that found the indictment in this case was one of the committing magistrates; such fact was pleaded in abatement to the indictment, urging the incompetency of the Grand Juror, upon the ground that he had prejudged the case. The Court say, "We do not understand that our laws require that the Grand Jurors shall be free from any previous opinion, as to the guilt of the accused."—*The State v. Green Chairs and Albert M. Neal.* August, 1877, p. 124.

GUARDIAN'S BOND. See Pleading and Practice, 4.

HOMESTEAD. See Judgment, 3. See Alimony, 3.

1. WHEN Alienable.—Before the establishment of the Constitution on the 5th of May, 1870, there existed no Constitutional or other legal inhibition to restrain the alienation of a homestead by husband, all transfers anterior to that date are valid.
2. CONSTITUTION Went into Effect. When.—The Governor made proclamation on the 5th of May, 1870, declaring the result of the vote upon the ratification of the Constitution, which consequently went into effect upon and bears test from that date.—*Mary Bilbrey v. J. I. Poston.* July, 1877, p. 77.
3. CANNOT be Alienated, though the Sale be for Full Value in Money or Real Estate. When.—Where a wife has not consented, by conveyance as required by law for married women, the homestead cannot be alienated, though the sale be for full value in money, real estate, or other things; this rule obtains as to the right of homestead only; the fee remains qualified by the right of occupancy, which cannot be disturbed, while the relation supporting the right of homestead exists.—*M. J. Carter, by next friend, v. John S. Hattam, et al.* February, 1878, p. 326.
4. CONSTRUCTION of Section 11, Article 11 of the Constitution of 1870, and Homestead Act of 1870.—While the Act of 1870 exempts the homestead from being sold by legal process, during the life of the head of a family, and gives the benefit of the exemption to the widow, and continues the exemption until the youngest child arrives at age, there is no statute that prevents the husband conveying the property as he may choose, *if he has no wife*; nor need the children join in the conveyance. Under such circumstances no right of homestead exists in favor of the children.
5. PRACTICE.—The word "about" includes an approximate amount; that is, a note, a few dollars more or less, is within its meaning, but cannot be held to include one for more than double the sum.—*Caldwell & Hayes, v. W. C. Bowman, et al.* May, 1877, p. 20.

HOMESTEAD—*Continued.*

6. CONVEYANCE, Without Wife's Consent. Title Void. Remedy.—Where the wife does not join in a conveyance of the homestead, such conveyance is absolutely void, so far as it abridges her homestead rights, and she may, by next friend, file a bill *quia timet* to have the cloud removed, and her homestead rights declared, though she has never parted with the possession or occupancy.—*Paralee Williams, by next friend, L. S. Woods, v. J. B. Williams and J. M. Seals*. February, 1878, p. 316.
7. DEBT Contracted Before Passage of Law Statute of Limitations. New Promise after Passage of Law.—The Statute of Limitations operates *only* to bar the remedy; a new promise, therefore, is not the substantive cause of action, but the original debt. Hence, under the Act of 1870, a homestead is not exempt from the payment of a debt contracted *before* its passage, although the bar of the statute has been completed, and the new promise is made *subsequent* thereto.—*Woodlie v. Twoles and Wife*. February, 1878, p. 331.
8. DOWER. Widow Entitled to Both. When.—The right of dower is unaffected by any legislation creating a homestead, except as to the mode of its assignment prescribed by the Act of 1873. The widow of an intestate, dying seized and possessed of real estate, is entitled to both homestead and dower.
9. MODE of Assignment.—The homestead shall first be set apart, as dower is set apart by the same commissioners, and then one-third of the remainder will constitute the dower.—*Mahulda J. Lovelace v. Wm. and A. J. Lovelace*. January, 1878, p. 281.
10. DOWER. Widow not Entitled to Both. When.—While a widow is entitled to dower out of her deceased husband's estate, she has no additional homestead right, except as against a creditor of the head of a family, who is seeking to enforce his debt by execution or attachment. Under the Act of 1868 a homestead is not included by any statute under the idea of articles exempt from execution, which go to the widow, and not to the administrator.—*W. P. Lanford, Adm'r, etc., of W. J. Lewis, Deceased, v. Mary F. Lewis, et al., and Mary F. Lewis v. S. M. Glenn, Guardian, etc., et al.* February, 1878, p. 328.
11. INTEREST or Right of. Not Alienable by Husband. Though Reversionary Interest Is. Article 11, Section 11, of Constitution Construed.—It is the homestead right, or right of use and occupation, that the Constitution and statute intend to protect from sale or alienation, without the consent of the wife; but the reversionary interest of the husband in land used as a homestead, may be mortgaged and sold to pay the debts secured, otherwise the creditors' claims, in many cases, would become stale, and barred by the Statute of Limitation.—*Martin Moore v. Abner Hervey and A. H. Duncan*. May, 1877, p. 22.
12. RIGHT OF. Cannot Prevail over Vendor's and Mechanic's Lien. When. Such Lien Continues. How Long. And may be Enforced. How.—The homestead right cannot prevail over the lien given by statute, in favor of one furnishing the material for the building on the lot claimed as a homestead, and this lien includes not only the buildings erected, but also the lots on which they are erected, and continues for one year after the time at which the materials were furnished. The lien thus given by statute may be enforced by attachment, either at law or equity.—*Terrell Thompson, Surviving Partner, etc., v. W. W. Wickersham and J. N. Wardlaw*. October, 1877, p. 209.

**HOMESTEAD—Continued.**

13. **RIGHTS of Widow to.** Though Moved off during Husband's Lifetime. Rents.—The widow is entitled to her homestead, though moved off the land by her husband during his lifetime, but is not entitled to an account for rents against the vendee of the husband, whose possession was during the lifetime of the husband.—*Sarah L. Neam v. Wm. E. Campbell, et al.* May, 1877, p. 28.

**HUSBAND AND WIFE.**

1. **CURTSEY in Seperate Estate. Exists. When.**—Real and personal property was conveyed by a husband to a trustee for the benefit of his wife, in the following language: "The trustee is to hold the same for the sole and separate use, behoof and benefit of her, her heirs and assigns forever, free from the debts, contracts, or control of her husband; and the said trustee shall permit her, her heirs and assigns, to have the occupation, possession and enjoyment of the aforesaid real and personal property, and receive the rents and profits of the same, etc." The wife dying first, there being birth of issue, the Court *hold*, that inasmuch as this deed makes no settlement of the land in the event of the wife's death, and provides only for the dominion and control of it during her coverture, that he has abridged his estate by his deed for that period only, and that having survived her, he is entitled, as tenant, by the curtesy.—*R. D. Frazer, Trustee, v. Jemima Hightower and others.* October, 1877, p. 190.

**ILLEGITIMACY.**

1. **DESCENT.**—When an illegitimate woman dies seized of real estate, leaving no child, mother, or brother, but leaving a husband and an illegitimate sister, *Held*, That the sister is not entitled to the estate as against the husband.—*Willie Scroggins v. Alexander Barnes, et al.* June, 1877, p. 58.

**INJUNCTION.**

1. **BOND. Damages on. Not Allowable. When.**—Where a plaintiff is put in possession of property, in the character of a Receiver, by the Court's fiat, granting an injunction, such party is not liable to damages upon the injunction bond, growing out of the destruction of said property, without his fault, pending the litigation; the injunction being issued with probable cause, his liability is such as the law imposes upon receivers, and yet his responsibility to damages, to some extent, in an action on the bond on the mere ground that the injunction was sued out without legal cause might be conceded. The Court *hold*, the defendant is entitled to the rental value of the house from the time of the injunction to the time of its destruction by fire, except for such time as defendant was in possession or received rents. Attorney's fees are not allowable.—*E. L. Davenport v. John Harbert.* September, 1877, p. 172.

**INSOLVENCY. See Deed, 5. See Decrees, 2.**

1. **INSOLVENCY of Estate. Suggestion of. Protects Administrator. When.**—In case of default by administrator to *scire facias*, based on suggestion of *devastavit*, to make the administrator personally liable; suggestion of insolvency of estate will defeat such personal liability, if such suggestion is made before such liability became fixed.—*Wm. Griffin v. Sarah W. Fowles.* May, 1877, p. 30.
2. **SAME. Statute of Limitations.**—The statute of three years will be effective, as to parties who fail to file their petition within the proper time; notwithstanding the pendency of an attachment bill in their favor at the time proceedings

**INSOLVENCY—Continued.**

were begun to administer the estate as an insolvent estate. The attachment bill was not a suit against the administrator. It could at most have given a right to satisfaction out of the land attached, but the petitioners failed to prosecute their attachment bill to a decree, or to ask for any relief in the other case in the time limited. The filing of the insolvent bill did not of itself destroy or defeat the rights acquired by the attaching creditor, but the creditor lost his right to come in as a party to the insolvent bill by failing to come in within the proper time.

3. **SAME.** Same. Devisees.—It is argued that the statute of three years is not available to protect the devisees of the realty; that this statute only protects the personal representative. But the plea of the personal representative is effectual, whether satisfaction is sought out of the personalty or realty.
4. **SAME.** Same. Trust in Favor of Creditors.—Where a testator directs that certain property be sold for the payment of debts, this does not create such a trust in favor of any particular creditor as will affect the statutory bar.—*Jackson Hubbard, Ex'r, v. W. J. Epps, et al.* February, 1878, p. 320.

**INSURANCE.**

1. **CONTRACTS** of Insurance not Abrogated. When.—Contracts of insurance are not abrogated by reason of failure to pay premiums, when such failure was consequent upon the war.
2. **WHERE** Policy-Holder Dies During the War. Rights of his Representatives.—When the policy-holder, in such cases, dies during the war, his representatives are entitled to the value of a paid-up policy on the day the premium was first omitted to be paid, with interest.
3. **PROCLAMATION** of the President. Did not do Away with Enemy Relation of Parties.—The proclamation of the President of August 18, 1861, and March 31, 1863, did not do away with the enemy relation of the parties. By the Act of Secession and the declaration of war they had already become citizens of opposing powers of government; their contracts had been suspended.—*Elvira A. Crawford v. Aetna Insurance Co., and Elvira A. Crawford v. Manhattan Insurance Co.* August, 1877, p. 130.

**INTEREST.**

1. **INTEREST** on Judgments. When, and How Much Allowed.—Section of the Code 3137a repeals the twelve and a half per cent. law, and establishes six per cent. as the legal interest on judgments; nor is this section confined to cases where the judgment below is affirmed on trial, but extends to cases where certiorari is dismissed, and where by statute the judgment below is affirmed.—*W. P. Haley v. Thomas S. Moore.* May, 1877, p. 31.

**JUDGES.** See Criminal Law, 7 and 8.

**JUDGMENT.** See Statutes, 1.

1. **CANNOT** be Inquired Into. When.—A judgment of a Court having jurisdiction of the persons and the subject-matter, is conclusive between the parties as to the matter in controversy, and cannot be inquired into, if unappealed from, unless it was obtained by fraud, accident, or mistake.
2. **JUDGMENT** against Married Women.—A judgment against a married woman is not void, although it be based upon a contract she was not competent to make, and is still binding upon her until set aside by appeal or other appropriate methods.

**JUDGMENT—Continued.**

3. **HOMESTEAD.** Right to. Exists. When.—Where a debt is contracted before the homestead act of 1868, and a note is given for the same subsequent to that time, no right to homestead is created thereby.—*Wm. F. Crawford and Wife, Martha A., v. Crawford & Thompson.* June, 1877, p. 37.

**JURISDICTION.**

1. **OF STATE and Federal Courts.** Is Exclusive and Independent.—Where a State or Federal Court has rightful jurisdiction of parties and the subject matter, it must be allowed to proceed to judgment and execution; their jurisdiction being exclusive and independent, process issuing from the one cannot be enjoined by suit in the other.
2. **MANDAMUS.** From Federal Court. Defence Against by Petition, with New Parties. Must be Made. Where. Not Necessary for Petitioners to have been Parties to the Original Suit. Taxpayers are Entitled to no Notice, an Ordinance Levying a Tax being Legislative in Character. The Decision of a Court Ordering a Mandamus has the Effect of a Judgment. When.—When a mandamus from the Federal Court orders a tax to be levied to satisfy its judgment, petitioners avoiding the payment of such tax have no relief in the State Courts, since the jurisdiction to correct the judgment, or protect parties from its effect, must either be in the Court rendering the judgment, or one having the revisory power upon writ of error. The questions being the same, the State Courts cannot take jurisdiction merely because the petitioners are new parties; it was not necessary that petitioners should have been parties to the original suit. Since the act of adopting an ordinance levying a tax is not judicial, but legislative in character, no notice to taxpayers is requisite to give it validity. The decision of the Court ordering such a mandamus has the effect of a judgment, and leaves the defendant without discretion.
3. **SAME.** Issues in Nature of *Fieri Facias*. When.—If a mandamus issues to compel the levying and collection of a tax, to satisfy a judgment of that Court, it issues in the nature of an ordinary *fieri facias*, and is not an original proceeding, but simply a mode of executing the judgment of the Court.
4. **CONSTITUTION.** Construed. Merchants' Tax. The provision of the Constitution relied upon, in this case, is construed to mean simply that no merchants' tax—that is, the privilege tax upon merchants—shall be levied upon that part of their capital used in buying goods to sell to non-residents, but the property tax upon merchants shall be uniform with general property tax.
5. **ARGUENDO.** State Court Can Take Jurisdiction. When.—Cases might arise where the State Court could take jurisdiction—that is, if the city was proceeding to collect a tax from property exempt, or to collect double the amount assessed—the taxpayer, without denying the legality of the levy, might have his remedy in a State Court to avoid paying that which under the levy he was not bound to pay.—*The Merchants of Memphis v. The City of Memphis and F. C. Schaper, Tax Collector.* October, 1877, p. 195.

**JURY.** See Evidence, 10. See Criminal Law, 5.

1. **INSTRUCTIONS to Jury.** In Absence. Of Counsel.—While it is improper for the Court to instruct the jury in the absence of the parties' litigant, thereby depriving them of the opportunity to except, or to ask for qualification of the instruction, yet the Court *hold*, where it can clearly be seen that no injury has been done to the party by the instruction given; in a case of such slight departure, no reversal can be had for such action.

*James C. Crawford.*



**JURY—Continued.**

2. **AFFIDAVIT OF.** Will not be Received. When.—Affidavits of jurors will not be received for the purpose of showing that the jury misunderstood the charge of the Court, or that they failed to follow his charge, or that the verdict was rendered in a mistaken opinion as to the law or facts of the case.
3. **EVIDENCE.** Discovered by Juror. And Related after Retirement. Not Competent. Affidavit the Proper Mode of Bringing the Fact Before the Court.—Evidence submitted to the jury shall be sworn evidence, submitted in open Court, under the safeguards of the law, and open to cross-examination, or liable to be met by countervailing proof on the part of the party who may be affected by it; evidence, therefore, discovered by one of the jurors, and related to his fellows after retirement, is incompetent. An affidavit of a juror is the proper mode of bringing such facts before the Court; the deliberations of the jury being secret, in no otherwise could the fact be developed.—*Wade v. Ordway*. September, 1877, p. 159.

**JUSTICE OF THE PEACE.** See Bond.

**LARCENY.**

- 1. A Dog the Subject of.—Under the statute of interpretation, Section 51, Code of Tennessee, a dog is personal property, and, therefore, if of any value, is the subject of larceny.—*The State v. Brown*. June, 1877, p. 69.

**LEVY.**

1. **INSUFFICIENCY OF.** Assurance of Title. Statute of Limitation.—The description in the levy in controversy was as follows: "Levied October 7, 1857, on 100 acres of land, the property of Salathiel Riley and Francis Fannin, adjoining Joel W. Jarvis, in the 5th District." *Held*, the levy is insufficient, and the Sheriff's deed upon the same is inoperative, and not an assurance of title, or an effective muniment to create a title under the Statute of Limitation.—*Salathiel Riley, et al. v. John Frost, et al.* December, 1877, p. 272.

**LIEN.** See Decrees, 4. See Deed, 1. See Deed, 4 and 5. See Fees, 1. See Homestead, 12,

1. **VENDOR'S LIEN.** Does not Exist. When.—The endorsee of a note, given for land, growing out of a verbal contract of sale, made by a married woman of an interest descended to her, no deed or conveyance being executed pursuant to our statute regulations, effective to convey such interest, has no lien upon said land; when such purchaser has not been influenced by representations of the married woman to accept said note.—*G. W. Perkins, Trustee, v. Harding Scales, et al.* May, 1877, p. 5.
2. **LIEN.** How it may be Created. Estoppel.—Where a lien is reserved on the face of a deed conveying a lot of land to secure a sum of money due to the vendor, the lien is good as between the vendor and vendee and their representatives, although the money constituted no part of the consideration for the land, and the deed was not signed by the vendee. The vendee, by excepting the deed, is estopped from disaffirming the charge contained in the face of it.—*N. M. Trezevant v. T. C. Bettis, et al.* June, 1877, p. 48.
3. **LIEN.** Passes by Assignment of Note. When.—Where a deed to land retains upon its face a lien for purchase money, an assignment of the vendee's notes will pass the lien, with all the rights of the assignor against the land, and the assignee will have the same power to sell the land in its enforcement, and in the same way, as the vendor might have done, had he retained the notes.

**LIEN**—*Continued.*

4. **DOWER**.—The dower, in such land, entitles the widow to only one-third of the surplus, after the note has been liquidated, her interest being subordinate to its payment.—*Featherston & Adkin v. James Boas, et al.* November, 1877, p. 224.

**MANDAMUS**. See Jurisdiction, 2.

**CONTEMPT**.—While implicit obedience to a writ of mandamus is required, and no evasion is allowed, a strict and literal compliance is not required. As where a change has been made in the law requiring the performance of the particular act which has been commanded by mandamus, and the officer to whom the writ is directed, acting in good faith, according to his best judgment as to the effect of such change, in his legal liability refuses further obedience, he shall not be punished for contempt, although mistaken in his judgment; and where a party refusing to obey, shows that he is willing to comply with the mandate of the Court, he will not be punished, but will still be compelled to do the act required by the writ. An alias mandamus is the proper remedy to compel obedience where the first order has not fully been complied with.—*The State, ex rel., P. C. Bethel, v. The City of Memphis, and the General Council of that City.* July, 1877, p. 73.

**MARRIED WOMAN**. See Attorney, 2 and 3. See Judgment, 2. See Lien, 1.

1. **CONTRACT With**. Survives to Her.—Where the interest of creditors is not affected, an agreement with a *feme covert*, and a promise to her personally with the assent of her husband, raises the presumption that she is the meritorious cause of such agreement, and it will survive to her, held to be the rule at law as well as in equity.
2. **OPERATES only on the remedy**, it must be pleaded: *ore tenus* defence not admissible.
4. **STATUTE of Limitation**. Does not Bar Debt. For Money Borrowed from Trustee. When.—If a trustee loans the trust fund in breach of the trust, and the borrower has notice of the trust and the breach, he becomes a *quasi* trustee, and he cannot separate the loan from the trust, nor insist that the statute of limitations, which bars a loan as a loan, also bars the remedy for the trust fund in his hands, and if it be followed into the hands of one who receives it by collusion, or with express notice of the trust, he cannot plead the statute of limitation, for the reason that he himself becomes the trustee, and the fund can be recovered.—*Merriman, Adm'r v. John Cannon, et al.* July, 1877, p. 94.
5. **CONVEYANCE By**. Clerk's Act. Judicial.—It was the intention of the Legislature to make the execution of a deed, by a married woman, one of the most solemn acts known to the law. The act of the clerk in taking the privy examination of a married woman, is not altogether ministerial in its character; it was designed to be a judicial act, or at least assimilated to a judicial act.
6. **SAME**. Clerk's Duty in Privy Examinations.—The Clerk, in taking the privy examination, must not only be satisfied that she understands the nature of the act, but that she *fully* understands it, and as evidence that he has performed his duty, he must put on the back of the record, or annex to it, the prescribed certificate.
7. **SAME**. Same. Acts Contemporaneous.—The privy examination and other certificate were designed by the act to be contemporaneous acts, and the execution of the deed to pass the married woman's estate and title, is imperfect and incomplete, until the official act of the clerk or other officer is made perfect and

**MARRIED WOMAN—Continued.**

complete, by meeting in letter and spirit every requirement of the statute, and if the clerk is stricken by paralysis or lightning, so as to be deprived or incapable of action before he makes his certificate, the failure to make it is not such an accident as equity can relieve against.

8. **SAME.** Same. Conveyance. What Necessary to Complete.—A conveyance by a married woman of her estate, must be in strict accordance with the letter of the Statute. The Statute must be construed strictly, and the conveyance cannot be considered as the complete act of the wife, until the certificate has been placed upon it.
9. **SAME.** Same. Jurisdiction of Equity.—Wife cannot, by her own deed alone, pass her freehold estates, and it cannot be conveyed in any other mode than that prescribed by statute, and equity has no jurisdiction to treat the neglect of the clerk to record the privy examination upon the deed, as an accident or mistake upon which relief can be obtained against a *feme covert*.
10. **SAME.** Same. *Feme Covert*. Not to Account for Purchase Money. When.—A married woman's separate estate will not be held responsible, nor will she be made to account for purchase money paid to her husband, when the conveyance has been defectively acknowledged, or the certificate of the clerk has not been annexed or attached to the deed; when, from the facts in the case, it appears that the married woman did not, in fact or in law, perpetrate a fraud, and where the purchase money was paid to her husband, without her authority, after she had avowed her purpose never to execute the deed, and where the parties had full knowledge that she was dissatisfied with the contract.—*Louisa J. Rhea, by her nextfriend. v. Martin R. Isley, et al., and Martin R. Isley v. Louisa J. Rhea, et al.* January, 1878, p. 292.

**MAYHEM.** See Criminal Law, 6.

**MORTGAGE.** See Superseas, 3.

1. **OF GOODS** to Include Additions to Stock, and Reserving Power of Sale.—A mortgage, made to secure debts maturing at a future day, which conveys a stock of goods in a particular store, and any other goods which may from time to time, during the existence of the mortgage, be purchased by the grantors, and put into said store to replace any part of said stock which may have been disposed of, or to increase and enlarge the stock now on hand, is void *per se*.
2. **ARGUENDO.** To sustain a Conveyance of Property. Not *In Esse*. What necessary.—To sustain a conveyance of property not *in esse*, there must be a valuable consideration; it is, therefore, doubtful whether pre-existing debts will be sufficient. The contract must be one of which a Court of Equity would decree the specific performance, or the property, when it comes into *esse*, must be taken possession of by the grantee before adverse rights attach.—*Phelps, et al. v. Murray, et al.* August, 1878, p. 114.
3. **DESCRIPTION** of Property in. Sufficient. When.—A description which will enable third persons to identify the property is sufficient. The description in the deed was as follows: Seventeen head of horses, three mules, eight wagons complete, six carts complete, eighteen scrapers and attachments. *Held, sufficient.*
4. **PAROL** Proof. Admissible.—Parol evidence is admissible to identify the property, which the mortgage itself indicates.

MORTGAGE—*Continued.*

5. PROVISIONS in Mortgages for Future Advances.—Provisions in a mortgage for future advances, if free from fraud, is not objectionable.—*John Atwood v. Brown & Dillon, and Caldwell & Hays*. June, 1877, p. 59.
6. PROPERTY not in *esse*. Is the Subject of a Valid Mortgage.—A crop yet to be planted is the subject of a valid mortgage. Such an assignment is held by the Court to be lawful.—*J. N. Wyatt v. W. M. Watkins*. September, 1877, p. 148.

MOTION. See Sheriff, 2. See Clerks, 1.

NOTICE. Bills and Notes, 7.

OATH. See Sheriff, 1.

OFFENCES AGAINST THE PERSON. See Criminal Law, 3.

OFFICERS. See Fees, 5 and 6.

ORDERS. See Bills and Notes, 6.

PARTNERSHIP. See Pleading and Practice, 8.

PAUPER'S OATH. See *Qui Tum* Action, 1.

PERSONS UNDER DISABILITY. See Administrator, 4.

1. INFANCY. Parents Liable for Maintenance. When.—A brother, as a volunteer, undertook the maintenance and education of his sister, who had abandoned her father's home, and without his fault. *Held*, under such circumstances no promise to pay for a mere volunteer for the maintenance of the child, can be implied on the part of the parent. He who intervenes in such a case, to make the child independent of the parent does but encourage its alienation from the line of filial duty, and stands in no relation to be favored by the law.
2. ARGUENDO. The father was bound to support his child, and that obligation might be enforced against him as a legal duty, if she had been compelled, by bad treatment, to abandon the parental roof, the law would compel him to furnish the infant daughter, under such circumstances, the necessities of life. The parent is bound by positive law to protect, to educate, if able to do so, and to maintain his child during its minority, or until its voluntary abandonment of the parent's protection. But the duties of the relation are mutual and reciprocal. The parent is bound to provide for the child; but he is, on his part, entitled to the obedience, to the custody, and to the services of the child. If the authority of the parent is abjured by the child without any necessity occasioned by the parent, all legal obligation to provide for the child is at an end; and, in such a case, the parent cannot be made liable for even necessities furnished his child by a volunteer, except by his consent.—*Tinckray v. Tinckray, Executor, etc.* January, 1878, p. 283.
3. INFANCY. Sale of Land. Innocent Purchaser. Burden of Proof. Estoppel.—A bill to confirm the sale of an infant's land must allege that it is to the minor's interest to confirm the sale. In the defence of innocent purchaser, the burden is upon defendant to make it out by proof, and he must show that he paid the purchase-money before notice of complainant's claim. Complainant is not estopped by the admission that while an infant she knew of the proposed sale to a third party, though she did not inform the purchaser of an intention to disaffirm.—*Richerts, by her next friend, v. Ebbin and others*. February, 1878, p. 318.

**PERSONAL PROPERTY.** See Larceny, 1.

**PLEADING AND PRACTICE.** See Chancery Court, 8. See Corporations, 2, 3 and 4. See Decrees, 1, 2 and 3. See Evidence, 6, 8, 9 and 10. See Executions, 1, 2 and 3. See Garnishment, 1. See Bills and Notes, 7 and 10. See Homestead, 5.

1. **PLEADING.** Abandonment of Original Suit by Amendment, where Declaration is not changed to Conform to Writ.—Where a suit is brought by the husband in his name as such, and afterward amended so as to stand as the suit of himself as administrator, for the use of his children, it is an abandonment of the original suit as husband, and unless the declaration be amended so as to conform to the changed condition of the suit, the action as amended cannot be maintained.
2. **ATTACHMENT.** Abandonment of, with Suit.—Where an ancillary attachment has issued in aid of the suit as husband, and the amendment as stated is made, the attachment is also abandoned, with the suit.—*Jere Hagerty v. F. M. Hughes.* May, 1877, p. 12.
3. **PLEADING.** Cross-Bill. New Parties In. Not Allowed.—A cross-bill may be based upon *any proper matter of equity* growing out of the original bill, or connected with it, on which the respondent might be entitled to affirmative relief on a cross-bill, *if filed separately*; but the defendant to an original bill cannot introduce in his cross-bill new parties, they will not be liable to any decree on the original bill, nor could the complainant in this way be compelled by the defendant in the original bill to take such a decree, or be delayed in the prosecution of their rights by the interposition of these third persons into the litigation by the defendants.
4. **GUARDIAN'S BONDS.** Sureties On. Liable to *pro rata* Contribution.—Where a guardian has given bond and security as such, and is afterward required to give an additional bond (having received other funds). *Held*, the sureties upon the first and second bond are liable to *pro rata* contribution.—*John S. Odam, et al., v. Richard L. Owen, Adm'r. of James S. Odam, deceased, and Peter Tully, et al., and Peter C. Tulley v. Fisher & Jetton.* July, 1877, p. 83.
5. **WRIT of Error.** Supersedeas. Dismissed. When.—Where a cause is pending in the Supreme Court by writ of error and supersedeas, generally the supersedeas will not be discharged on motion because there is no error in the decree sought to be reversed; this would determine the entire case upon the motion; but where a supersedeas has been improperly granted, the decree being insufficient to warrant a writ of error, it may be discharged by the Court.
6. **INDIVIDUAL CREDITORS.**—Individual creditors are entitled to priority over firm creditors in the distribution of the individual estate.—*Jenny Richardson, Adm'x, v. Wm. Richardson and others.* July, 1877, p. 99.
7. **MULTIFARIOUSNESS.** What is.—A bill is multifarious when several matters of a distinct nature are complained of against divers defendants, or a bill that unites against a single defendant several distinct matters; the Court must look to the circumstances of each case to avoid multiplicity of suits, on the one hand, and inconvenience to defendant and confusion of evidence on the other.
8. **PARTNERSHIP.** Statute of Six Years does not Run Against Partner. When.—No right of action for an account accrues to a retiring partner that can be "effectually prosecuted" until the liquidating partners having possession of

PLEADING AND PRACTICE.—*Continued.*

the assets have settled the debts of the partnership; the statute of six years, in such case, does not run against the retiring partner.—*George B. Miller, et al., v. Allen Harris, et al.* September, 1877, p. 157.

9. CLIENT and Attorney. When Client may Dismiss Suit Without Attorney's Consent.—The suit was brought upon an apprentice bond for the use of Scott. Afterwards the parties signed a writing, directing the suit to be dismissed. Scott's lawyers interposed, and the Court declined to dismiss.

*Held*, A party has a right to dismiss a suit of this character, to compromise and arrange his own rights, and no agent or attorney of his, he being *sui juris*, can control his action in such a matter, the attorneys having no lien except on recovery, not before. No fund was empounded.—*George J. Clement, et al., v. State, for use of J. F. Scott.* December, 1877, p. 261.

10. PRACTICE. Petition for Certiorari. Sufficiency of.—Where a party, in his petition for a *certiorari*, simply states that he misunderstood the officer as to the time of the trial, without charging that the officer practiced any deception upon him as to time, or that he made his return different from the truth, such a petition is insufficient.—*Nathan M. Cox v. Joshua Kent.* November, 1877, p. 245.

PRINCIPAL AND AGENT. See Fraud, 2.

PROCLAMATION OF PRESIDENT. See Insurance, 3.

POWERS. See Charter, 1. See Corporation, 2.

## PUBLIC SCHOOLS.

1. PUBLIC School Law. Violated. When.—A contract to set out trees, shrubbery and evergreens around a school-house, or a contract to enclose a school-house with a fence, and to furnish furniture for the room, is such a contract as the Board might make, and is, consequently, in violation of the 19th Section of the public school law if made with a director.
2. CONTRACT. Consideration Implied. When.—The making of a contract implies a consideration, and the charge of taking a contract imports, *ex vi termini*, an agreement to do so on a sufficient consideration.—*The State v. T. J. Keeton and D. A. McGrady.* March, 1878, p. 366.

## QUI TAM ACTION.

1. PAUPERS OATH.—*Qui tam* actions must be prosecuted with bond and security. The right to sue in *forma pauperis* is a personal right, not a privilege to be exercised in a representative capacity.—*E. M. Johnson v. A. G. Hunter.* September, 1877, p. 168.

## RAILROADS. See Charter, 1, 2 and 3.

1. LIABILITY of Connecting Lines. When Place of Loss is Unknown. Onus of Proof. Upon Carrier. When.—If the delivery of Goods to a connecting carrier can be shown, such company becomes liable to the owner or shipper for all damage and losses occasioned by negligence, subject at most only to the limitations stipulated for in its behalf by the first company, and the duty of tracing the loss, and fixing it upon the party first liable, is put upon the carrier.
2. NOTICE. Given in Reasonable Time. After Discovery of Loss. Sufficient.—Where the extent of damage or loss is of such a nature as to be difficult of

**RAILROADS—Continued.**

ascertainment, if notice be given in reasonable time after the facts are known, is sufficient.—*The Memphis & Charleston Railroad Co., in error, v. Holloway & Tatum.* November, 1877, p. 219.

**REASONABLE DOUBT.** See Bastardy, 1.

**RECORDS.** See Chancery, 2.

**REDEMPTION.** See Execution, 3.

1. **REDEMPTION of Real Estate. Partial Payments.**—The purchaser may receive partial payments or demand the full amount. In the absence of any other agreement, partial payments must be understood, with reference to the redemption laws, and by the favor of the purchaser. If at the end of two years the whole amount be not paid, the purchaser becomes debtor to the original owner to the extent of the amount paid, which may be recovered either in Chancery or by an action at law.—*Wm. H. Rambo v. R. A. Donnelly et al.* December, 1877, p. 278.

**RENTS AND PROFITS.** See Homestead, 13. See Sale, 2.

1. **RENTS.** Of Land Under Trust Deed. Not Attachable. When.—A trustee holding the legal title to land, under a deed of trust, to secure creditors, but not in possession, has no right to the rents, nor can the same be attached by the secured creditors.—*John McCall, S. R. Curver, and Carroll Beaver v. James P. Cawthorn and Wife, et al.* May, 1877, p. 26.

**ROAD.**

1. **OBSTRUCTING Public Road.** Indictment for.—In an indictment for obstructing a public road, it was alleged that the road was laid out by the County Court. Held by the Court to be tantamount to the charge that it is a public highway.—*The State v Alexander Farrer.* August, 1877, p. 122.

**SALE.** See Administrator, 2. See Chancery, 10. See Decrees, 3, 4 and 5. See Execution, 1, 2 and 3. See Persons Under Disability, 3. See Warranty, 1.

1. **SALE of Land. Deficiency in Quantity. Abatement in Price for.** When.—A lot represented to the purchaser as fronting sixty-two feet on High street, and running back one hundred and seventy feet to an alley, in Nashville, Tenn., was sold for \$12,815 in gross. Before confirmation of the sale the purchaser applied for relief, on account of a deficiency in quantity of two feet front.

*Held,* The purchaser is entitled to no relief.

2. **SAME.** Same. Rents.—The purchaser was entitled to possession from confirmation, and as possession was not obtained, he may recover rents from that time.—*Thomas and Mary Shields v. Hannah Thompson.* February, 1878, p. 313.

3. **SAME.** Same. Abatement in Price for, not Allowed. When. Chancery Sale.—The purchaser of land at a Chancery sale bought by a plat giving the number of acres and boundaries; the number of acres given were 267, while, in fact, the lot contained only 224 acres, as was discovered by the purchaser about two years later. The Clerk, by order of Court, reported the land worth \$7 per acre as a minimum price. Upon calculation based upon this price the purchaser bought. The mistake as to quantity was made by the surveyor, without fault of either commissioner or purchaser.

*Held,* The purchaser is entitled to no reduction in price for such deficiency in quantity.—*J. T. Hillis v. G. W. Martin, et al.* January, 1878, p. 303.

## SHERIFFS.

1. SHERIFFS in Charge of Jury. Oath of.—Sheriffs and Deputy-Sheriffs must have the special oath administered to them when in charge of jury. The law makes no distinction in favor of Sheriffs, as against constables and other officers.—*Samuel Maynard v. The State*. August, 1877, p. 139.
2. SHERIFF. Motion Against for Insufficient Return.—A petition which assigns as the only reason for the non-execution of process, that the Sheriff's term of office would expire very soon after it came to his hands, is insufficient. In contemplation of law he was still the Sheriff, and his official term continued, as a matter of law, until the qualification of his successor. He should have made the levy, and not have risked the contingencies by which the plaintiff may have lost his debt.—*W. P. Testaman, et al., v. Hiram Holt*. December, 1877, p. 279.

## SPECIAL LEGISLATION.

1. UNCONSTITUTIONALITY OF.—The Act of the Legislature of 1875, authorizing the institution of suits in the State Courts, by municipal corporations with a population of 35,000 or more, without giving bond for costs, is repugnant to Article 11, Section 8 of the Constitution, which declares that the Legislature shall have "no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land," and is, therefore, void.—*City of Memphis v. Fisher*. September, 1877, p. 169.

STAMPS. See Deed, 3.

## STATE.

1. STATE can not be Sued. When.—The State cannot be sued by her citizens in her Courts, even in a defensive suit, and a demurrer to this effect will be sustained.—*Francis M. Price v. The State*. March, 1878, p. 370.

## STATUTES.

Administration, 1784, 1827 .....	December, 1877, p. 264
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**STATUTES—Continued.**

1. **CONSTITUTIONALITY** of Act of March 6, 1875.—This Act provides, "that in all cases now pending in the Supreme Court, or hereafter brought thereto, in which the judges shall be equally divided, the judgment shall be determined as follows: 'If the case depend upon the constitutionality of any Act of the General Assembly, then such judgment or decree shall be in favor of the validity of such Act. In all other cases, the judgment or decree of the Court below shall be affirmed.'"
- Held*, To be unconstitutional.—*George W. Perkins, Trustee, v. Harden Soales, et al.* May, 1877, p. 15.
2. **A PROMISE to Answer for the Debt of Another.** Not Within the Statute of Frauds. When.—An agreement made by the vendee of lands to pay part of the purchase money to a creditor of the vendor, is not within the statute of frauds. This case overrules the case of *Campbell v. Finley*, 3 Hump., 330.—*Moore & Miller v. George A. Stovall*. September, 1877, p. 153.
3. **STATUTE of Limitation.** Request for Delay.—Where a request for delay is made, the party agreeing not to take advantage of the statute of three years for non-resident creditors, he will not be estopped from pleading the statute of six years in defence of the debt.—*Thomas Maloney, Adm'r, etc., in error, v. A. B. Wilson, Adm'r, etc., in error*. January, 1878, p. 286.

**STATUTE OF LIMITATIONS.** See Bills and Notes, 8. See Corporations, 4. See Homestead, 7. See Insolvent Estate, 4. See Levy, 1. See Married Woman, 4. See Pleading and Practice, 8. Statute of Two Years and Six Months. See Administrator, 6. Act of 1875, Chapter 83, Concerning Convicts and Costs. See Fees, 4. Act of 1875, Authorizing the Institution of Suits, etc. See Special Legislation, 1.

**SUBSTITUTION.** See Surety, 4.

**SUPERSEDEAS.** See Pleading and Practice, 5.

1. **SUPERSEDEAS** to an Interlocutory Decree. Practice.—The petition for superseas to an interlocutory decree or order, under Sections 3933 and 3934 of the Code, should be accompanied by a transcript of the record, or at least so much thereof as will show clearly the error complained of.
2. **INFERIOR COURT.** Binding Decision.—Until a previous decision of the Supreme Court is reviewed and reversed by that Court, it is error in the Court below to disregard it.
3. **MORTGAGED Property.** Exemption of.—The rights of a mortgagor to reclaim, before sale, exempted property included in the mortgage discussed.—*G. W. G. Payne v. George S. Johnson*. March, 1878, p. 363.
4. **SUPERSEDEAS.** How and in what Cases Supreme Court can Exercise it.—Under the authority given the Supreme Court by Sections 3933, 3935, 4512 and 4513 of the Code, to supersede interlocutory orders and decrees, that Court can simply suspend or supersede, for the time being, the execution of such orders and decrees as are of a nature to be actively and affirmatively enforced, and are *in feri*, but have no power, in this mode, to reverse the action of the inferior Court, or to set aside, or annul, or supersede orders or decrees, which are merely of a negative or prohibitory character, or such as have been executed.

SUPERSEDEAS—*Continued.*

5. **SAME.** Chancellor's Fiat.—Nor has the Supreme Court, in a proceeding of this character, the power to supersede the fiat of a Chancellor awarding extraordinary process.—*Mary A. Redmond, et al., v. Y. W. Redmond.* March, 1878, p. 359.

**SUPREME COURT.** See Statutes, 1. See Supersedeas, 1, 2 and 3.

**SURETY.** See Conveyance, 2. See Evidence, 11.

1. **SURETY.** Liability of on Note. Though Administrator of his Deceased Principal is Protected by the Statute of Limitations.—Although the administrator of a principal in a note may defeat a recovery upon the note by the plea of the Statute of Limitations, yet the exoneration of such administrator does not relieve the sureties of his intestate from liability.
2. **SAME.** Remedy of Surety.—When the surety on such note is compelled to pay the debt, he then has cause of action against the administrator of either the principal for the amount so paid, or the administrator of a co-surety for *pro rata* contribution.
3. **SAME.** Right of Action Accrues. When. Statute of Limitations.—While the surety is entitled to his motion, upon rendition of the judgment, yet his cause of action is the payment of the judgment, and the statute begins to run from that time, and not from the rendition of the judgment.—*John C. Reeves, Executor of George W. Reeves, v. J. L. Pulliam, Executor of W. G. Day.* November, 1877, p. 236.
4. **JOINT SURETIES.** Right of Substitution.—Where a creditor has a judgment against two joint sureties, which is a lien upon the land of one of them, and the other pays off the entire judgment, the latter surety is substituted to the rights of the creditor to enforce the said lien for one-half of said judgment.—*W. C. Holt and Timothy Dowling v. John M. Strain and R. M. Strain.* June, 1877, p. 49.

**TAXATION.** See Charter, 3. See Corporations, 2, 3 and 4. See Jurisdiction, 1, 2 and 3.

1. **TAX** Paid by Reason of Threats of Litigation, etc. Not Recoverable. When.—A tax paid by reason of threats of litigation, or the apprehension of the levy of distress warrants, cannot on this ground be recovered, although the levy and tax was illegal, there being no fraud or mistake of facts, but only mistake as to legal liability. A State or city may and ought to refund a tax so paid.
2. **A CITY** is Contracting Party, and not Agent. When.—In a matter of taxation the city is contracting party and not the agent of the taxpayers.
3. **CERTIFICATES** of Indebtedness. Issued by City. Valid. When.—A certificate of indebtedness issued by a city, upon its own ordinance, to individuals, who have paid illegal assessments, are valid and binding obligations against the city, and founded upon a valid consideration.
4. **SAME.** Issued by the City of Memphis. Receivable for Taxes. When.—The certificates of indebtedness issued by the city of Memphis in 1873, were receivable for taxes on account of "Nicholson pavement" for the years 1873-74-75, from those who had paid the original assessment to Brown, but while this was so, a State Court would not interfere with the special "mandamus tax" levied under the mandate of the United States Court, as this would be in effect to defeat the execution of the order of said Court.—*Lee v. City of Memphis.* September, 1877, p. 170.

**TAXATION—Continued.**

5. **TAX TITLE.** Ejectment. Collector's Deed.—The terms of the statute, which make the recitals of a collector's deed *prima facie* evidence of the facts contained therein, apply only to the collector who makes the sale, and cannot be extended to his successor.
6. **SAME.** Same. Same.—A tax collector has no such power as will enable him to make a deed conveying title, when out of office, to a party who purchased from him during his term of office. Section 640 of the Code requires the deed to be made by the collector or his successor, as an officer, in office at the time.
7. **EJECTMENT.** Dereignment of Title.—When two parties claim title under some third person, it is sufficient to prove the derivation of title from him, without proving his title.—*Joseph W. Allen v. C. C. Moss.* March, 1878, p. 354.
8. **TELEGRAPH LINES.** Taxable.—Telegraph lines are considered as partaking of the nature of realty, in analogy to the new doctrine that railroads and rolling stock are so treated, and consequently, under the Act of March 24, 1875, such property is held by the Court liable to State and county tax.—*Western Union Telegraph Co. v. The State of Tennessee and County of Sumner.* August, 1877, p. 126.

**TITLE.** See Deed, 1 and 2.

**TRUSTS.** See Insolvency, 4. See Rents and Profits.

**USURY.** See Bills and Notes, 10.

**WARRANTY.**

1. **WARRANTY.**—Where title bond described the land in these words: "Known as Wolf Island tract, lying in the Tennessee river, between Savannah and Crump's Landing, and containing 214 acres, less tide washes.  
*Held,* To be no warranty that the island should contain 214 acres.
2. **PAROL EVIDENCE.**—Parol evidence may be looked to to determine whether a sale of land was intended to be by the acre or in gross.—*Witherspoon, et al., v. Porter, et al.* June, 1877, p. 51.

**WIDOW.** See Wills, 4.

**WILLS.** See Evidence, 1, 2, 3 and 4.

1. **EXECUTORS.** Power to Sell Land, etc.—Whether an executor is to distribute the fund need not be found expressed in direct terms on the face of the will, but is to be arrived at from the whole scope and context of the will, the fairly inferred intention of the testator; in other words, such a power to sell land on the part of the executor may be gathered from the will by necessary implication, as well as by express designation.—*W. W. Parker v. John Sparkman.* March, 1878, p. 368.
2. **RULE for Construction of Will.**—The intention of a testator is to be ascertained not by subtle or artificial rules of construction, but by the will itself, upon the most easy, reasonable and natural reading of its terms as reflecting the intention of the testator.

**WILLS—Continued.**

3. **DEVISE to a Class.**—Where the will directed that “after the death of my wife I desire my executors to take charge of my estate and divide it equally among my children, and those of my children who are dead at the time, I wish their children to represent their parents, and take their share of my estate,” it is

*Held*, That these words vest the remainder in the children or grandchildren living at the termination of the life estate as a class, and not in severalty.

4. **EXTENT of Widow's Estate.**—It is also held upon a proper construction of the will that the estate of the widow was not absolute, but was only usufructuary for her life to the extent of all the products and profits thereof.—*Cornwall, et al., v. McKenna, et al.* October, 1877, p. 185.

**WITNESS.** See Evidence, 9. See Fees, 7.

**WRIT OF ERROR.** See Pleading and Practice, 5.

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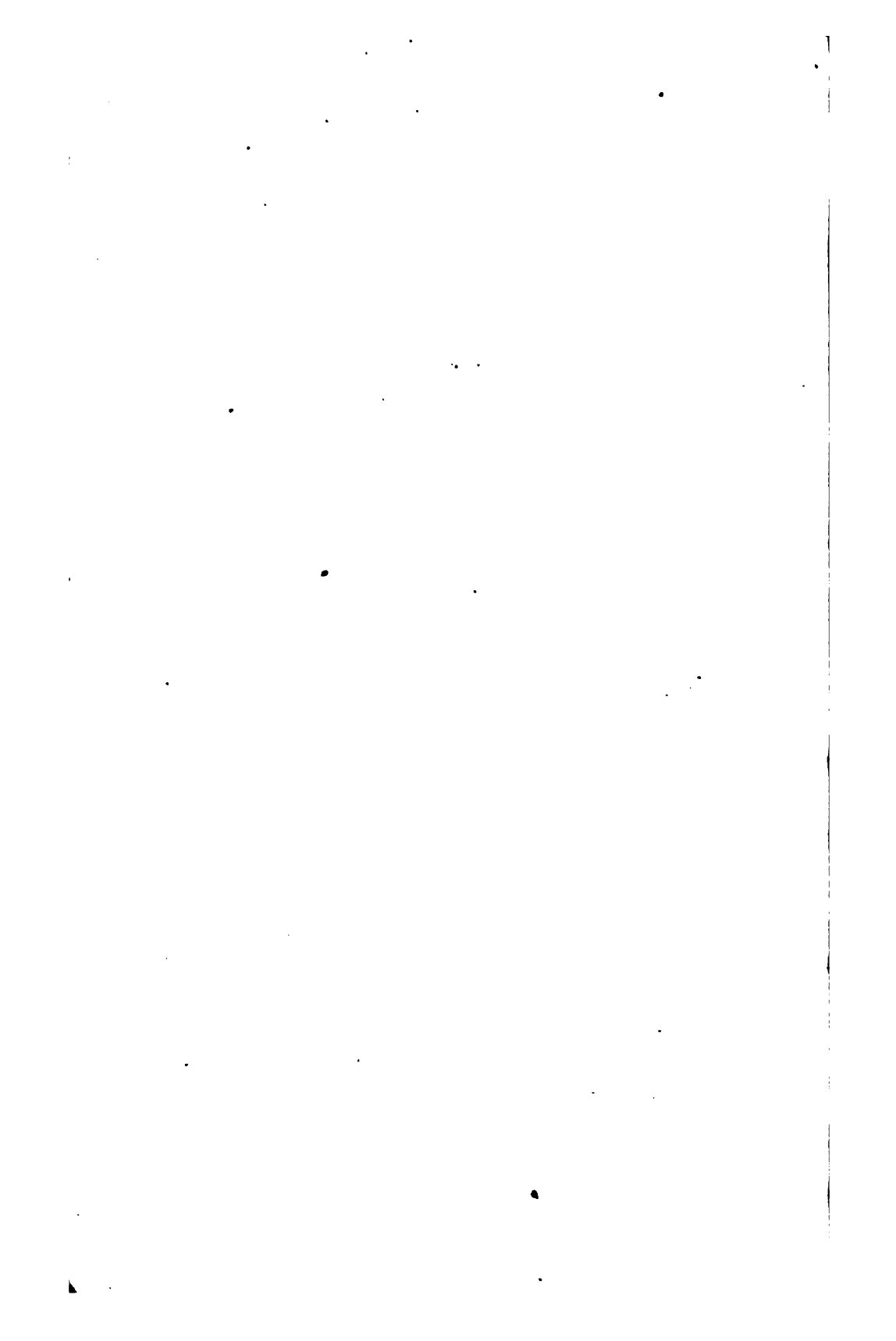
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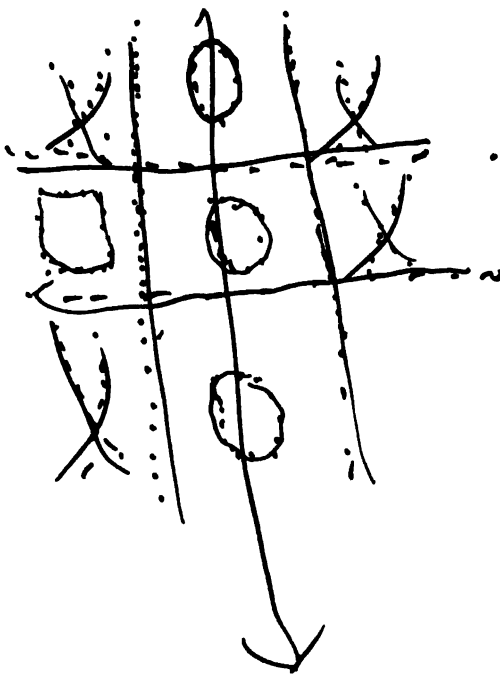
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